EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND TRADE

OF THE

COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 1560 and H.R. 2382

AND

MARKUP

OF

TRADING WITH THE ENEMY REFORM LEGISLATION

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EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

TUESDAY, MARCH 29, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met at 2:03 p.m. in room 2200, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee), presiding.

Mr. BINGHAM. The Subcommittee on International Economic Policy and Trade will come to order.

Today this subcommittee opens a series of hearings on the Trading With the Enemy Act of 1917 entitled "Emergency Controls on International Economic Transactions."

Originally passed at the time of the country's entry into World War I "to define, regulate and punish trading with the enemy," through usage and amendment the act has become one of the basic underpinnings of our foreign economic policy in time of peace as well as war. Although the vast powers conferred upon the President by this act have been a source of controversy for years, it has never been given a thorough review by Congress.

It is our intention that these hearings will constitute a broad review of the policies and procedures for the conduct of the Nation's international economic affairs. Since this is an important and complex subject, the hearings will extend over a period of several weeks and include both administration and public witnesses. Among the issues to be aired are the following:

(1) Is the Trading With the Enemy Act an adequate authority, as the administration contends, for the imposition of trade embargoes in time of peace? If not, what should replace it? As one possibility, I have introduced the Economic War Powers Act—H.R. 2382.

(2) Is the asset control authority of the Trading With the Enemy Act adequate for regulation of private bank lending to the developing nations, if such regulation should become necessary for reasons of foreign policy or national security, or is new legislation needed?

(3) Is the Trading With the Enemy Act an adequate authority for the exercise of transaction controls by our Government on foreign subsidiaries of U.S. companies in furtherance of our foreign policy and national security? If not, what authority would be adequate for those purposes and what should the purposes be?

(4) What procedures should be written into the law, perhaps along the lines of the War Powers Resolution, to insure a role for Congress

in the exercise of authorities currently provided for by the Trading With the Enemy Act?

The key operative part of the Trading With the Enemy Act is section 5(b), which authorizes the President broadly to regulate foreign exchange, credit, currency, securities or property transactions involving any foreign country or foreign national in time of war or national emergency declared by the President.

Pursuant to the provisions and the intent of the National Emergencies Act, passed last year, this subcommittee must report to the full International Relations Committee its recommendations for recasting section 5(b) as much as possible in a framework of standard, nonemergency legislation and for setting limits on whatever emergency authorities are retained.

I had originally intended to take testimony tomorrow from the two lead agencies involved in the exercise of authorities under section 5(b) the Departments of State and the Treasury. However, in order to allow time for high level policy thinking on these issues, I have postponed appearance by those agencies until April 19 or 20, at which time I hope that Richard Cooper, Under Secretary of State for Economic Affairs, and Fred Bergsten, Assistant Secretary of the Treasury for International Affairs, will be available. We will hear public witnesses tomorrow, instead, and representatives of the Commerce and Justice Departments on Thursday.

May I ask at this time if there are any other opening statements?

Mr. Whalen.

Mr. WHALEN. I have none, Mr. Chairman.

Mr. BINGHAM. Any members on this side?

[No response.]

Mr. BINGHAM. Today we are privileged to have three distinguished legal scholars to help introduce the subcommittee to the intricacies of the subject. We will hear first from Prof. Andreas F. Lowenfeld of New York University Law School, and formerly with the Office of Legal Adviser in the Department of State. I may say, also a neighbor of mine in my own community.

Then we will hear from Prof. Harold G. Maier of Vanderbilt University Law School, currently a Visiting Scholar at the Brookings Institution.

Our final witness will be Prof. Stanley D. Metzger of Georgetown Univerity Law Center, also formerly with the Legal Adviser's Office in the State Department.

I would like to ask the witnesses to deliver their statements consecutively, limiting themselves to about 20 minutes each, and then we will have plenty of time to question them as a panel.

Professor Lowenfeld.

STATEMENT OF PROF. ANDREAS F. LOWENFELD, NEW YORK UNIVERSITY SCHOOL OF LAW

Andreas F. Lowenfeld, A.B. M.c.L. 1951 Harvard, LL.B. M.c.L. Harvard, 1955, U.S. Army 1955–1957; Private practice of law in New York, 1957–61; U.S. Department of State, Office of Legal Adviser: Special Assistant to the Legal Ad-

viser, 1961–63; Assistant Legal Adviser for Economic Affairs, 1963–65; Acting Deputy Legal Adviser, 1964–65; Deputy Legal Adviser, 1965–66. Fellow John F. Kennedy Institute of Politics, Harvard University, 1966–67; Professor of Law, New York University School of Law, 1967–present.

Special Fields: International Law, International Economic Transactions, Conflict of Laws, Aviation Law.

Member: American Society of International Law, Council on Foreign Relations, American Arbitration Association, American Bar Association.

Author: *International Legal Process* (with Chayes & Ehrlich, 1968–69); *Expropriation in the Americas* (1971); *Aviation Law* (1972); *International Private Trade* (1975); *International Private Investment* (1976); *Trade Controls for Political Ends* (1977); *The International Monetary System* (forthcoming); as well as numerous articles in Harvard Law Review, Columbia Law Review, New York University Law Review, American Journal of International Law, American Journal of Comparative Law, Journal of Maritime Law and Commerce, Journal of Air Law and Commerce, Foreign Affairs, New York Times, etc.

Mr. LOWENFELD. Thank you, Mr. Chairman, members of the subcommittee. It is a pleasure for me to appear before this subcommittee and to be of such help as I can in your inquiry into section 5(b) of the Trading With the Enemy Act. I am honored to have been invited to appear before your subcommittee, and I appear solely in response to that invitation and not in representation of any client, organization or interest. My sole purpose here is to share with you some of my thoughts and experiences concerning this extraordinary statute.

I first became aware of the Trading With the Enemy Act as a private practitioner when I worked with counsel for the Netherlands in trying to untangle some of the conflicting claims to enemy property vested or blocked during World War II. Later, as a member of the Office of Legal Adviser in the State Department, I had frequent occasion to work on section 5(b) and to observe the consequences of its use for our foreign economic policy and our foreign relations in general.

More recently, in connection with a series of books on international economic law, I have published a book on trade controls for political ends which explores section 5(b) of the Trading With the Enemy Act in the context of a general examination of political trade controls, including the export control program, the Arab League Boycott and the U.N. sanctions against Rhodesia.

I thought it would be most useful if I divided my presentation into four parts. First, an overview of the controls on international economic activity employed by the United States, focusing on how and where the Trading With the Enemy Act fits into the picture. Second, a discussion of some of the problems that have arisen from application of section 5(b) in our dealings with countries friendly to the United States. Third, a review of some of the uses of section 5(b) for purposes unrelated to the purpose of the statute or the emergencies that bring it into effect. And finally, a brief discussion of some of the legislative alternatives.

In doing this, I think the risks of overrefinement and oversimplification are about equally great. I am going to, I think, opt for oversimplification, subject to such correction as will come out. And I thought maybe for the first part I can summarize about 10 pages of my statement in a few sentences.

IMPORT AND EXPORT CONTROLS

Briefly, import controls have been imposed since the beginning of our republic and under fairly strict criteria, including hearings, publicity, and carefully stated authority.

Export controls are really more recent—essentially since World War II. They are applied under loose criteria and on the basis of a system that is made in and by the executive branch; essentially the bureaucracy built the system of export controls. There are stated criteria, there are regulations, there is licensing, and it is kind of a mixture of politics and law.

And then the Trading With the Enemy Act, in particular section 5(b), which relates to all other transactions—financial transactions, travel, remittances; anything and everything is controlled—and under no criteria whatever.

On the whole, import controls have been imposed for economic reasons with one major exception, which is the denial of most-favored-nation treatment to Communist countries since 1951. As you recall, Poland was exempt from that in 1960, and pursuant to a trade agreement just recently, Romania now gets MFN treatment. Yugoslavia has always been treated differently.

Apart from that on the import control side we treat all countries the same, whether they are dictatorships or democracies; whether they are friendly to us or not friendly to us; whether they have trade agreements with us or not. And the emphasis is on goods, on the trade-offs between the benefits of trade and comparative advantage of export controls versus protection of domestic business and jobs.

Export controls are political, no question about that. Now and then there is an exception for a scarce commodity like scrap copper or soybeans a year or so ago. But basically, the notion is that you control export of strategic commodities, however you define those—there is a lot of controversy over it—to certain countries. You control them by saying you cannot sell without a license, and if you apply for a license, you have to answer some questions, and then maybe the license is granted, maybe it is denied.

POLITICAL CONTROLS

The third type of controls under section 5(b) are all political, and they are not tied to goods. Their purpose is to express the strongest condemnation. It is interesting to see the difference, between export controls and controls under the Trading With the Enemy Act. Under the export control program which has been applied basically to the European Communist countries, there has always been some trade; We have never cut it off completely. Under the Trading With the Enemy Act, which has been applied to the Far Eastern Communist countries—China (until 1972), North Korea, North Vietnam, more recently South Vietnam, and Cambodia—there has been no trade, no financial transactions, no travel.

Now that is changed with respect to China, but it is still true with respect to all of the other Far Eastern countries. Although you could in theory get a license, in fact you never got it except for individuals in personal situations: somebody could send a package to a sick relative; that kind of thing.

There was never any licensing program with respect to commercial transactions involving these countries that we have condemned, the Far Eastern Communist countries, and since 1962 partly, and 1963 totally, Cuba.

For years there have been suggestions that the controls be eased one way or the other, and they have been met by the argument that to do that would give a misleading signal to the target country. It is interesting that, in fact, the early signals for a possible change to our policy to China did come in a series of small relaxations in the embargo with that country. First, tourist gifts were allowed; then the presumption that certain goods, like hog bristles and jade, were of Chinese origin, was removed. Then restraints on foreign subsidiaries of U.S. companies, were relaxed. Then the prohibition was lifted on the use of dollars in dealings with the Chinese. Finally, a general license was issued for nearly all trade with China shortly before Dr. Kissinger went on the famous trip to Peking in the summer of 1971.

As far as I know, none of these changes came in response to individual applications. All were steps in a political game. I suppose economics entered into the game in terms of calculating the effect on China and some of the other countries of the denial program, but there was no balance—as we have in the export control program—of gains to the U.S. economy against losses to the target country.

EXTRATERRITORIAL APPLICATION OF CONTROLS

Let me turn now to the second part of my outline and to the extraterritorial application of controls under the Trading With the Enemy Act. It is an interesting and perhaps unfamiliar subject.

Section 5(b) itself provides for the exercise of the authority granted with respect to "any person or any property subject to the jurisdiction of the United States." Then it authorizes the President to define all those terms, including "person," "property," and "jurisdiction." And that authority has been exercised in the Foreign Assets Control Regulations to assert jurisdiction over (i) all citizens of the United States, wherever they may reside; (ii) all residents of the United States, whatever their citizenship; (iii) all persons actually within the United States whatever their residence or citizenship; (iv) all corporations organized under the laws of the United States or any of its States or territories; and (v) all partnerships, corporations, or enterprises, wherever organized or doing business, linked to the United States by ownership and control. Of course, it is the fifth point that has been the sore point with a good many other countries.

The argument for the assertion of jurisdiction in this broad way is that it prevents evasion of the controls. You do not want the person in the United States to just go across the border to do what he is not allowed to do here. To use a current familiar analogy, the judgment has been that this is an area where we do not want the kind of shopping for favorable legal climate that we have with the flag of convenience shipping or offshore trusts, tax havens, and so on.

The argument the other way is that controls asserted by the United States over essentially foreign operations impinge on the sovereignty of foreign nations, make it difficult for them to maintain their own foreign economic policies and often make U.S.-based investment less welcome than it would otherwise be. I do not think we would dream

of applying, say, U.S. minimum wage laws to foreign subsidiaries of U.S. companies. We do tax earnings of U.S. corporations, but only as they are repatriated, and we give credit, for the most part, for taxes paid abroad.

But in the area we are talking about here, we purport to prohibit activities of foreign corporations, lawful—and often encouraged—in those countries where the activities are to be carried on by virtue of an ownership or management link to the United States.

In my statement, I go through a number of episodes where that happened, particularly with respect to Canada and with respect also to France. Maybe you want to come back to that. For the moment, for the sake of saving time, I just want to leave two thoughts with you on this aspect of section 5(b).

It is, of course, a foreign policy statute, but it is not just foreign policy to Cuba, China, and Korea; it is also foreign policy with respect to Canada and France and England and other friends. In fact, the closer the interchange, as such is with Canada, the closer the number of citizens, for example, whom we have on boards or in management positions of foreign companies, the greater the frictions.

Second, I think it is fair to say that the Trading With the Enemy Act controls are, in large part—not exclusively, but in large part—symbolic. That is, we certainly do not expect to overthrow the Government of North Korea. We did not ever, I think, expect to overthrow Mao Tse Tung. We do not want to overthrow Fidel Castro. Perhaps we once did, but not now. I do not think we ever really expected to bring Castro down through economic sanctions.

It is a symbolic action; it has some value. It is the worst name you can call somebody without bloodshed, without war. But as we move toward the symbolic use of these controls, it seems to me we ought to be concerned less about possible evasion; furthermore, we ought to resolve doubts in favor of refraining to assert jurisdiction over foreign operations or corporations linked to the United States.

MISUSE OF SECTION 5(b)

Let me turn next to what I have called misuse of the Trading With the Enemy Act. Perhaps using that term prejudges the issue. Your committee will have to judge whether you think it is proper use or misuse. But what I am really talking about is the reliance on section 5(b) for actions when other statutory authority was lacking or defective. I have referred to section 5(b) as a political weapon, economic warfare, if you will, in the context of a cold war of shifting intensity. But there are three points I want to mention—and others detailed by the committee in its committee print of last November—where section 5(b) has been used as an economic measure without connotation of enemy involvement. And a fourth point—repeated several times—section 5(b) has been used, I believe improperly, as a reserve authority for the export control program when that program's basic authority expired. I have four episodes I want to just briefly mention.

BANK HOLIDAY OF 1933

The first one is President Franklin D. Roosevelt's reliance on the Trading With the Enemy Act. As his first official act, he issued a proclamation closing the banks on March 6, which was the Monday

of his first term, 1933. I have been reading some of the history books about that first week. It seems Roosevelt was prepared to close the banks without any authority and was persuaded by the Cabinet that it is better to rely on some authority than no authority at all. And so he relied on the Trading With the Enemy Act. And he did that, even before the Trading With the Enemy Act read as broadly as it does now. Of course, there was very little having to do with "enemy" and, indeed, not much having to do with "foreign" in the step of closing the banks.

I think the proclamation was contrived. In fairness, it only lasted a few days, because Congress then passed a statute expressly ratifying and confirming everything President Roosevelt had done. But I still think it was wrong. I am not suggesting there was no emergency. We had 13 million people out of work. The banks apparently, literally were running out of money, and it may be that the experience may suggest some kind of standby authority, some kind of emergency authority, though not particularly in the international area. But relating such action to the war powers or to an enemy seems to me unfortunate, for a couple of reasons.

First, I think it breeds disrespect and cynicism about law, precisely among the persons who should be most careful about obedience to law; that is, the President and his senior advisers.

Second, I think our courts have a history—it is really almost a conditioned reflex—of staying away from challenges of governmental action when you mention the word "foreign affairs" or "War Powers" or "national security." If that is so, I think one ought to use that kind of authority with great reserve.

JANUARY 1, 1968: RESTRAINTS ON DIRECT FOREIGN INVESTMENT

A second episode I want to mention is President Johnson's implementation of his balance-of-payments program in January 1, 1968, when he placed restraints on direct foreign investments by U.S. companies, requiring repatriation of earnings and setting up what became an elaborate bureaucratic set-up of the foreign direct investments programs. It was a whole regulatory program really made up out of whole cloth.

Again, the program may have been advisable, though one could argue it postponed measures relating to the realinement of currencies that perhaps should have been taken sooner than they eventually were.

For this purpose, I want to point out only the measures were taken without debate by or authority from the Congress, and they had no rational connection with the purpose of the Trading With the Enemy Act. It is interesting that President Johnson's Executive order cites "the continued existence of the national emergency declared by Proclamation 2914 of December 16, 1950."

Most people reading this would say it is the usual boilerplate; what does it matter? But I recognized that proclamation; I am sure by now, members of this committee will too. That was the proclamation issued by President Truman when the Chinese crossed the Yalu River in December 1950, after MacArthur had gone into North Korea: it was hardly related to the crisis of the dollar following the devaluation of the pound sterling a couple of months before.

Moreover—and this again is one of the recurring weaknesses of action under section 5(b)—President Johnson's action was not a 60-

day or 90-day emergency program pending congressional action. The program was kept in force for more than 6 years, tinkered with continually, and used for a variety of related or unrelated purposes. For example, there was a section that attempted to induce investment in developing countries that may or may not be a worthy cause, but it had nothing to do with the emergency program. That seems to me wrong.

AUGUST 15, 1971 : CLOSING THE U.S. GOLD WINDOW

Third, when President Nixon took his famous action of August 15, 1971, closing the gold window and ending convertibility of the dollar, as far as I can tell, he did those things without any authority, international or domestic, but not in violation—or at least not in clear violation—of any international or domestic authority. One can argue about compliance with the Articles of Agreement of the International Monetary Fund, but at least it is not apparent.

Then he proclaimed an import duty surcharge of 10 percentage points ad valorem on nearly all dutiable goods entering the United States. As I mentioned before, the tariff setting authority is the one area where the Congress has delegated authority to the President very carefully, with provision for hearings and notice and the range of modifications that he can make, and none of those delegations were designed for surprise weekend announcements or across-the-board surcharges.

Just because there was existence of the statutes—the Tariff Act of 1930 and the Trade Expansion Act—and, indeed, because the Constitution had committed the raising of revenue to the Congress, President Nixon did not think he could just proclaim the surcharge on the basis of the foreign affairs power, that vague power that is supposed to emanate from the Constitution, though you can never quite find it.

Interestingly, he did not want to cite the Trading With the Enemy Act directly, at least in part because a principal target of the surcharge was Japan, and he was scheduled to meet Emperor Hirohito in Alaska a few weeks later on the Emperor's first trip abroad since the war. Mention of the Trading With the Enemy Act in connection with that surcharge, to say the least, would have been awkward as he met with the Emperor.

But the President's lawyers were worried that if he just mentioned the trade legislation in the proclamation raising the duties, the surcharge might not stand, and here was one area where you could anticipate legal challenge by an importer who did not want to pay the duty. So what the President's lawyers did was to get the President to declare a national emergency and then to state that he was acting under the authority of the Constitution and statutes "including but not limited to the Tariff Act of 1930 and the Trade Expansion Act."

When the judicial challenge came in *Yoshida* v. *United States*, but only then, did the lawyers in their answering papers say, well what we meant was the Trading With the Enemy Act. The Customs Court said, well, OK, you can trot out the act; we don't mind that. But the court went on to say that the Trading With the Enemy Act does not encompass the powers to impose duties, and it struck down the duty surcharge. When the case was appealed the Court of Customs and Patent Appeals agreed with the lower court that none of the provi-

sions of the trade legislation covered the action. But nonetheless, it reversed. It said:

> We find it unreasonable to suppose that Congress passed the Trading With the Enemy Act, delegating broad powers to the President for periodic use for national emergencies, while intending that the President, when faced with such an emergency must follow limiting procedures prescribed in other acts designed for continuing use during normal times

I think this committee may want to focus on that and see whether that describes what you think the Congress passed that statute for. As for me, I find the opinion to be a thin one which should not—and I think will not—go down in history as one of the great efforts to define the scope of congressional delegation or the powers of the Presidency. It may be that the most important factor in that case, though as far as I know it is not mentioned in any of the papers, briefs or opinions, was that if the decision had gone the other way, the Government stood to lose more than half a billion dollars collected in just the 4 months the surcharge was in effect.

The import duty surcharge had a curious relationship to the final case I want to mention, which I am sure most of you are aware of—the extension of export controls in the fall of last year. When President Nixon had removed the surcharge in December of 1971 in connection with the Smithsonian agreement on realinement of currencies, he did a very interesting thing. He terminated only paragraphs B and C of the August 15 proclamation, leaving in place the emergency declaration in paragraph A. And then when there was difficulty agreeing on extension of the Export Administration Act, that emergency, the 1971 emergency, as well as the Truman proclamation of 1950, were recited as the basis for keeping the export controls in effect.

EXTENSION OF EXPORT ADMINISTRATION ACT REGULATIONS

That happened once in 1972 for about 4 weeks, and then the Export Administration Act was extended retroactively to the date of the expiration. It happened twice in 1974, once in the 2-week period in the changeover between Presidents Nixon and Ford, and later for another 4-week period. And then when the strongest conflict over the Export Administration Act took place last summer—in particular, as you will recall, over the provisions directed to the Arab boycott—resort to the Trading With the Enemy Act had almost become routine.

President Ford's Executive order of September 1976 is really a carbon copy of the other three orders, just with numbers and dates changed. When questions were raised about the legitimacy of this, guess what: the Justice Department issued an opinion citing the previous orders and the *Yoshida* case, that is the case involving the import duty surcharge.

I am not sure whether, as a technical matter, the extension of export controls in this way is justifiable. I think maybe it is easier to justify the strategic controls to Communist countries—that has at least some relation to the other controls—than it is to justify the controls related to the Arab boycott.

But even if extension of export controls by resort to section 5(b) were upheld by the courts, it seems to me an action of doubtful

propriety. To restate in somewhat different form the point I made at the outset, it seems to me the reluctance of courts to strike down acts of the President taken in the name of national security is understandable. When I was a State Department lawyer—and Professor Metzger before me—we used to always make that argument when we did anything in the name of foreign affairs and national security. But I think the reluctance of the courts to intervene in such cases should put more and not less pressure on the executive branch and its lawyers, because it turns out that they are the final authority most of the time.

I think we have had too many "can-do" lawyers and too many clients—that is to say, senior Government officials—who say I want a "can-do" lawyer. I think that may be all right if you have a court to tell you if you are wrong. But that comfort is largely lacking in this area, and I think all the more reason for (1) more specific delegations—that is your function; and, (2) more restraint on the part of Government counsel. I would hope that perhaps this subcommittee, when it writes its report, could make that point.

SUGGESTIONS FOR LEGISLATION

Finally, I think I would just briefly, make some suggestions about legislation. I have not prepared a draft statute. Perhaps with a little more time I would try my hand at it.

REPEAL OF SECTION 5(b)

First, you could simply repeal section 5(b) of the Trading With the Enemy Act, as H.R. 1560 would do. The difficulty with that, it seems to me, is that it would bring down with it a number of programs, such as the embargo on trade with Cuba, that perhaps should not be terminated or terminated just now, or should not be terminated without some kind of quid pro quo. I do not know what our policy right now should be with respect to Cuba. I am sure this subcommittee is not interested on any views on that subject. All I say is, it would be an ackward act, in light of the report in the New York Times this morning, for example—perhaps even an inappropriate interference in negotiations being carried out by the executive branch—if the embargo were suddenly to end without any understanding, just because in prior administrations the executive branch had, from time to time, overstepped its bounds.

LIMIT NATIONAL EMERGENCIES

Second, another possibility would be to retain the delegation of emergency power, delegation of the declaration of emergency power, but to limit national emergencies to some stated time; 60, 120, 180 days, subject to express renewal.

I have some sympathy with that suggestion, which is similar to H.R. 2382. Coming again to the Cuban situation, however, I could imagine that the President might well not be anxious at a given point to proclaim anew a state of emergency even as he was negotiating for relaxation of tensions. Perhaps a modification of the proposal might be developed whereby an emergency might be extended by the

President on the basis of a finding of continued need, without requiring a new finding of emergency or new declaration.

I would not make such extension of authority unlimited in time. And I would hope it could be tied to some kind of control by the Congress, whether subject to disapproval or subject to approval after a certain period; whether by concurrent or joint resolution, one could work out some kind of control.

REGULAR REVIEW OF DECLARED NATIONAL EMERGENCY

Third, a variation of the previous proposal, which has been used since 1966 with respect to travel controls, would say it is the actual measures taken pursuant to the national emergency that would come up for review at regular intervals without a need for a new declaration of emergency. The thought would be to compel the Government—and I would say here including the President himself, not just the third delegate down the line—to think through at regular intervals whether extension of measures such as those taken under the Trading With the Enemy Act were still justified. I would not want to rule out small modifications such as those that were made with respect to China in the period of 1969 to 1971 and have been made recently with respect to Cuba. But no new measure, certainly no measure not linked to the state of emergency would be permitted without a new declaration of emergency.

DECLARATION OF EMERGENCY IS A SERIOUS ACTION

Fourth, I think an amended statute should make clear that a state of emergency in the United States is not an abstract concept. It is not like a state of siege in Latin American countries. One should not be able to proclaim a state of emergency on one subject and then take measures on a wholly unrelated subject that may well not be of emergency character at all, because it is convenient to act first and tell the Congress and public later. And I think it should be made clear, clearer than it is in present law, that a declaration of emergency is not to be made lightly.

EMERGENCY CONTROLS SHOULD NOT BE EXTRATERRITORIAL

Fifth, finally, I think if an amended statute, whatever its name, comes out of these hearings, the powers that it confers should be limited in their territorial scope to the United States or its citizens acting in their individual, as compared to managerial, capacity, and to operations plainly designed to avoid the controls applicable in the United States.

I do not, as is sometimes contended, say that our expansive assertions of jurisdiction are contrary to existing international law. But I believe we lose more in receptivity to U.S.-based investment and in respect to the United States generally than we can possibly gain by the kind of extraterritoriality that we have practiced on and off in the past in implementation of the Trading With the Enemy Act.

Mr. Chairman, perhaps I talked longer than I should have, but it is extraordinary how seldom the questions you raise with these hearings

have been raised by the Congress. I hope I am able to make some contribution.

Thank you very much.

[Professor Lowenfeld's prepared statement follows:]

PREPARED STATEMENT OF ANDREAS F. LOWENFELD, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

SECTION 5(b) OF TRADING WITH THE ENEMY ACT: SHOULD IT BE CONTINUED, MODIFIED, OR REPEALED?

Mr. Chairman and members of the Committee: It is a pleasure for me to appear before this Committee and to be of such help as I can in your inquiry into section 5(b) of the Trading With the Enemy Act. I am honored to have been invited to appear before your Committee, and I appear in response to that invitation, and not in representation of any client, organization, or interest. My sole purpose here is to share with you some of my thoughts and experience concerning this extraordinary statute.

I first became aware of the Trading With the Enemy Act as a private practitioner, when I worked with counsel for the Netherlands in trying to untangle some of the conflicting claims to alleged enemy property vested or blocked during World War II; later as a member of the Office of Legal Adviser of the United States Department of State, I had frequent occasion to work on section 5(b) and to observe the consequences of its use for our foreign economic policy and our foreign relations in general. More recently, in connection with a series of books on *International Economic Law*, I have just published a book on *Trade Controls for Political Ends*,[1] which explores section 5(b) of the Trading With the Enemy Act in the context of a general examination of political trade controls, including the export control program of the United States, the Arab League boycott of Israel, and the United Nations sanctions against Rhodesia.

I thought it would be most useful if I divided my presentation into four parts: (I) an overview of the controls on international economic activity employed by the United States, focusing on how and where the Trading With the Enemy Act fits into the overall picture; (II) a discussion of some of the problems that have arisen from application of section 5(b) in our dealings with countries friendly to us; (III) A review of some of the uses of section 5(b) for purposes unrelated to the purposes of the statute or the emergencies bringing it into effect; and (IV) A discussion of possible alternatives in dealing with section 5(b).

I—THE TWEA IN THE CONTEXT OF U.S. REGULATION OF INTERNATIONAL ECONOMIC ACTIVITY

In attempting to explain the regulatory aspects of the United States international economic policy, the risks of overrefinement and oversimplification are about equally great. For present purposes, I believe the latter course is preferable, since our aim is to put the Trading With the Enemy Act in context, and not to cover every aspect of United States law or policy. In particular, I want to concentrate here on governmental controls of private economic activities, leaving out the statutes and rules applicable to foreign aid (military and economic), to the Export-Import Bank, to the Commodity Credit Corporation, and to United States participation in multinational lending and regulatory agencies.

A. *The Tripartite Regulatory Scheme*

Basically, United States law divides international economic activity into three categories: imports; exports; and "all other," including financial transactions, foreign investment, and travel. Imports have been regulated since the birth of the Republic, exports only since World War II, and "all other" activities have by and large not been regulated, except intermittently, as we shall see, under the Trading With the Enemy Act.

Import Controls

Until 1934, tariffs, quotas and other conditions of entry of foreign goods were actually fixed by the Congress; since then, modifications in applicable duties have been largely delegated to the executive branch in the context of the reciprocal trade agreements program. But the delegation has been fairly precise,

[1] New York: Matthew Bender & Co., 1976.

in terms of the stated objectives, the requirements for hearings, the requirements for agreements based on an exchange of equivalent benefits, the maximum range of modification in duties permitted, the requirement of detailed reports to the Congress, and the period of time for which the basic authority is granted—typically three to five years. The administration of what is generally referred to as trade legislation, but is essentially controls on imports, is divided among STR, State, Treasury, and the International Trade Commission, but the criteria are laid down by the Congress and in substantial part subject to control by the courts.

Export Controls

Export controls have a much briefer history, principally because the prohibition in the Constitution on the taxation of exports from any state (Article I, § 9, Cl. 5) has been construed to apply to the federal government as well. Apart from war-time measures, controls on exports date only from the period of the cold war following World War II.

The export control program also works by delegated authority, but in contrast to import controls, the Export Control Act and its successor statutes contained a very broad statement of policy, and an equally broad mandate to the President "to effectuate the policies set forth in the Act." Since the 1969 sucessive Congresses have inserted somewhat more specific findings into the statute and have attempted to specify some criteria for administration of export controls, including standards for licensing, requirements for reporting and provisions for hardship exemptions. Fundamentally, the export control program, including the specification of items to be licensed, the classification of countries by groups, and the administration of the licensing system, remains a program made in and by the Executive Branch, with little participation by Congress and virtually none by the courts. There is one important check, however: Congress has never adopted the Export Control Act or its successors as permanent legislation. Since 1949 the Act has been adopted for 2, 3, or 4 years, never longer. Last summer, as you will recall, the Export Administration Act expired altogether as the committee of conference was prevented from meeting before adjournment of the 94th Congress. I will return to this later in the context of abuses of the Trading With the Enemy Act. For the moment, I want to stress only that the Congress has always viewed the scope of export controls and the breadth of the delegation as sufficiently out of the ordinary to wish to review it every few years.

Other Controls

The third category of controls—what for shorthand purposes we may call "financial and other"—is quite different. On the whole, as I have mentioned, the United States has not attempted to control international investment, travel, or financial transactions, except in time of war. But the statute designed for war may be applied also "in time of national emergency," and as the Committee is well aware, that term has been an elastic one without any standards or limits of time.

The Trading With the Enemy Act as a regulatory statute is different from the others we have seen in several respects. *First*, there seems to be no way under existing law to terminate a state of emergency proclaimed by the President except by another presidential proclamation;[2] and no practical constraint limiting actions taken under emergency authority to measures related to the emergency. The Trading With the Enemy Act itself, and particularly section 5(b), is legislation without limit of time. It has been in effect in its present form since 1941 and has had no expiration date or requirement of congressional scrutiny of review. *Second*, the delegated authority is not only broad: there are no criteria at all. Subject only to the existence of a national emergency, the power of the President, acting "through any agency he may designate" to affect property or transactions is virtually unlimited, provided there is at least some foreign connection in the property or transaction affected.[3]

I must say that it is a tribute to successive Presidents, and to the Justice and Treasury Departments which have administered the Act, that it has not been

[2] The National Emergency Act of 1976, which terminated all states of emergency effective two years after passage, excludes section 5(b) of the TWEA from its operation.

[3] How President Roosevelt found the foreign handle for his bank holiday proclamation in 1933 I never understood, but Congress specifically ratified that action before anyone could handle it.

more abused. The exceptions stand out just because they are unusual. But I think everyone who looks at the statute for the first time is struck by the fact that the President can take property, block bank accounts, prohibit transfers, create embargoes, forbid travel, without having to account to anyone, without effective judicial review, and without even a requirement of reporting to the Congress.

B. *The Political Uses of Trade Controls*

Import Controls

Import controls have, on the whole, been imposed and implemented on a non-political basis—with an important exception that I will come to in a moment. By "political" in this context I do not mean response to internal pressures, such as reservation of textiles from the Kennedy Round in the early 1960's or imposition of oil import quotas from 1959–73. Vis-a-vis the outside world, import controls have been applied on a non-discriminatory basis, balancing—with changing value judgments—the benefits of trade and the demands of protection, but without any effort to achieve goals unrelated to trade.

We give the same duty treatment to imports from England as to imports from South Africa; we give the same treatment to countries such as Mexico, with which we have no trade agreement, as we do to our GATT partners; and we don't distinguish between democracies and dictatorships, allies and opponents.[4]

The focus is on goods, not countries, and I am not aware of any instance in which the United States has used the promise of granting or withholding a trade benefit for extraneous purposes.[5] The one major exception, of course, is that since 1951 the United States has by statute denied MFN duty treatment to products of communist countries (not including Yugoslavia and (since 1960) Poland).

President Johnson wanted to obtain discretionary authority from the Congress to end discriminatory tariff treatment for communist countries that signed a trade agreement with the United States. President Nixon took the opposite approach, and signed an agreement first with the Soviet Union, subject to approval by the Congress. I need not remind this Committee of the long and passionate debate in 1973–74 over the Jackson/Vanik Amendment linking MFN to freedom of emigration, or of Dr. Kissinger's mini-shuttle diplomacy between the Congress and the Soviet Embassy trying to work out appropriate "assurances" with respect to improved opportunity for emigration. In the end, the deal fell apart, and with it the United States-Soviet Trade Agreement, though not, interestingly, the increasing volume of trade.

One could debate this subject endlessly. I mention it only to point out that (1) Congress has very chary with delegation of discretion; and (2) even where the discriminatory treatment has been greatest, trade does not stop completely: Duty-free (or non-dutiable) items from communist countries have come in without restraint; the others must hurdle tariff walls that do not apply to products of countries enjoying MFN, but they can come in.

Export Controls

Export controls, in contrast, have almost all been entirely political.[6] It was always realized that export controls burden our commerce and are bad for business. But a conscious judgment was made that the strategic and political gain outweighed the possible economic loss to the United States. In the past the regulations provided that certain products, deemed strategic, required a specific license to all countries, and that all products required a license to certain countries. Over time, the number of products requiring a specific or so-called "validated" license has been greatly reduced, and many items now can move under general license even to the primary targets of the export controls. Still, even at the height of the cold war, different countries in the Soviet bloc were treated differently (to use one of Secretary Rusk's favorite phrases), and some licenses were always obtainable. One way to show a country that we felt more warmly

[4] To some degree this statement is no longer entirely accurate as the result of the generalized system of preferences authorized by the Trade Act of 1974. In the present context, designed to bring out the characteristics of the Trading With the Enemy Act, the statement in the text is substantially correct.

[5] This statement would not be entirely accurate if one were to include such programs as the Sugar Act of 1948, which was in effect through 1974. The statement in the text refers to the basic trade legislation.

[6] The exceptions consisted of scattered restraints on exports of items in short supply, such as walnut logs, scrap copper, and most recently soybeans.

(or less hostile) to it was to change its "country group"; for instance in 1964 Rumania was transferred from the same category as the Soviet Union to the more favorable category in which Poland was classified, and in 1971 an even more favorable group was created for Rumania in response to our perception of that country's growing independence from the Soviet Union. Leaving aside the re-export problem, export controls were directed exclusively to the Communist states of Europe. The message was wariness, control, but not embargo.

Embargoes

For complete elimination of trade and other economic transactions—the most severe form of disapproval short of war—the United States relied on the Trading With the Enemy Act, specifically section 5(b). For twenty years no trade, no financial transactions, no travel was permitted with Communist China. The same is still true with respect to North Korea, North Vietnam, Cuba, and recently Cambodia and South Vietnam.[7] In theory licenses could be issued for specific transactions. But the Treasury Department in administering the Foreign Assets and Cuban Assets Controls hardly ever issued licenses (except to individuals for non-commercial transactions). An embargo meant an embargo, an important aspect of the measures taken under section 5(b) was that its targets—the Far Eastern Communist countries plus Cuba—were placed deliberately in a category of opprobrium lower than that of the countries subject to export controls.

For years suggestions that the controls be eased in one way or another were met with the argument that to do so would be to give a misleading "signal" to the target country. It is interesting that the early signals for a possible change in our attitude toward China came in a series of small relaxations in the embargo with that country—first tourist gifts were allowed, then the presumption that certain goods were of Chinese origin was removed, then restraints on foreign subsidiaries of U.S. companies were relaxed, then the prohibition was lifted on the use of dollars in dealings with China and on bunkering of Chinese vessels; finally, a general license was issued for nearly all trade with China, shortly before Dr. Kissinger went on his famous voyage to Peking in the summer of 1971.

None of these changes came, so far as I know, in response to individual applications. All were steps in a political game, sometimes subtle and sometimes not. Economics entered into the game in terms of calculating the effects on China (or North Vietnam, Cuba, etc.) of the denial program; there was no balancing, however, as there was in the Export Control Program, of gains to the United States economy against loss to the target country.

II—EXTRATERRITORIAL APPLICATION OF CONTROLS UNDER THE TWEA

Section 5(b) itself provides for exercise of the authority granted with respect to "any person, or ... any property, subject to the jurisdiction of the United States", and authorizes the President to define all the relevant terms, including "person," "property," and "jurisdiction." This authority has been exercised in the Foreign Assets Control Regulations to assert jurisdiction over (i) all citizens of the United States, wherever they may reside; (ii) all residents of the United States, whatever their citizenship; (iii) all persons actually within the United States, whatever their residence or citizenship; (iv) all corporations organized under the laws of the United States or any of its subdivisions; and (v) all partnerships, corporations, or other enterprises wherever organized or doing business linked to the United States by ownership or control. The argument for this expansive assertion of jurisdiction is that it prevents evasion of the controls. You don't want a person in the United States to just go across the border to do what he is not allowed to do here. To use a current analogy, the judgment has been that in this area we don't want the kind of shopping for favorable legal climate that one sees in flag of convenience shipping, offshore trusts, tax havens, and the like. The argument the other way, of course, is that controls asserted by the United States over essentially foreign operations impinge on the sovereignty of foreign nations, make it difficult for them to maintain their own foreign economic policies, and often make United States-based investment less welcome than it

[7] On the same day that the Committee's hearings took place the Treasury issued amendments to the Foreign Assets Control Regulations and the Cuban Assets Control Regulations issuing a general license for persons traveling to countries covered by those regulations to pay for normal transportation and maintenance expenditures and to buy small quantities of gifts for personal use. 42 Fed. Reg. 16620, 16621 (March 29, 1977). These amendments to the regulations are consistent with the expiration on March 18, 1977, of restrictions on travel to North Korea, North Vietnam, South Vietnam, Cambodia, and Cuba.

would otherwise be. I don't think we would dream of applying, say, United States labor laws to foreign subsidiaries of United States companies; we do tax foreign earnings of United States corporations, but only as they are repatriated and, in general, with credits for taxes paid abroad. But in the area we are talking about, we purport to prohibit activities of foreign corporations lawful—and even encouraged—in those countries where the activities are to be carried on, by virtue of an ownership or management link to the United States.

The best known case of this kind occurred in the winter of 1964–65 when the United States government attempted to block a sale by Fruehauf France, a French corporation 70 percent owned by Fruehauf of Detroit, of trailers to another French corporation which made tractors, because the tractor-trailers were to be sold to Communist China. The French minority shareholders persuaded a French court to appoint a receiver to carry out the contract, and the government of President de Gaulle protested strongly against what it called a violation of international law and French sovereignty by the United States. Similar cases occurred repeatedly with Canadian subsidiaries of United States corporations with respect to trade with China, when that was encouraged by Canada while it was prohibited by the United States. It seems that every time a Canadian Prime Minister came to Washington or an American President went to Ottawa, all the Canadians wanted to talk about was extraterritorial jurisdiction—which galled in several areas (securities regulations, antitrust, etc.) but most of all in the area of trade boycotts. When the United States applied the TWEA to Cuba in the early 1960's, a general license was issued to permit foreign corporations owned by "United States persons" to do most kinds of business with Cuba. The Canadians thought they had made their point; they were chagrined to discover, however, that the license did not apply to individual U.S. citizens who, as was common, had managerial positions in the foreign corporations. Just a couple of years ago for instance, the U.S. Treasury tried to prevent the Worthington Locomotive Works of Montreal from selling locomotives to the Cuban National Railways, because 52 percent of the shares of Worthington were owned by Studebaker of New York and two of Worthingtons directors were U.S. citizens. It took personal intervention by Prime Minister Trudeau and considerable publicity to persuade the U.S. government to give its consent for that transaction to go forward.

One could discuss this point at length, and perhaps the Committee will want to come back to it. For the present, I want only to leave two thoughts with you on this point. *First*, section 5(b) is foreign policy not only with respect to so-called "designated countries"; it creates foreign policy problems with allies as well, and indeed when the political perceptions differ, the closer the interchange, as with Canada, the greater the frictions. *Second*, it seems clear that TWEA controls are part actual denial, part symbolism; the more we move toward the symbolic use of these controls—e.g., we are not really trying to bring down the government of Cuba—the less we should be concerned about possible evasion and the more we should resolve doubts in favor of refraining to assert jurisdiction over foreign operations of corporations linked to the United States.

III—MISUSE OF THE TWEA

At the risk of prejudging the issue, what I refer to under the heading of misuse is the reliance on the TWEA as authority for executive action when other authority is lacking or defective. I have referred to section 5(b) as a political weapon—economic warfare if you will—in the context of a cold war of shifting intensity. But at three points that I want to mention (and others detailed by the Committee in its publication of last November), section 5(b) has been used as an economic measure without connotation of "enemy" involvement, and at a fourth point (repeated several times) section 5(b) has been used—I believe improperly—as a reserve authority for the export control programs when that program's basic authority expired.

1. President Roosevelt relied on the TWEA when, as his first official act, he issued a Proclamation closing the banks on March 6, 1933.[8] It seems that Roosevelt was prepared to take this step without reference to any law, but was persuaded that the color of statutory authority would lend legitimacy to his action. Looking back on that step, it still seems wrong, and the references to dealing with foreign exchange in the proclamation seem contrived. But as soon

[8] Proclamation 2039 of March 6, 1933, 48 Stat. 1689.

as the Congress convened, the action was approved and confirmed [9]—perhaps a recognition of the doubt about the original validity of the Proclamation. I am not prepared to suggest that there was no emergency in those grim first days of the Roosevelt administration, with 13 million Americans out of work and banks running out of money.[10] Perhaps this experience suggests the desirability of some sort of stand-by or emergency legislation; relating such legislation or action to the war power or an "enemy" seems to me unfortunate, however, on at least two grounds: (1) it breeds a disrespect for or cynicism about law precisely among the persons who should be most careful about obedience to law—the President and his senior advisers; and (2) our courts have a history—almost a conditioned reflex—of staying away from challenge of governmental action connected with the foreign affairs or war power.[11]

2. President Johnson used the TWEA to put into effect his balance of payments program of January 1, 1968,[12] placing restraints on direct foreign investments by United States corporations, requiring repatriation of earnings, and setting up what became an elaborate and constantly shifting program of capital controls.[13] Again, the program may have been advisable, though one might argue that it proposed measures to realign the value of the dollar that should have been taken sooner. For present purposes, I want to point out only that the measures were taken without debate or authority from Congress, and they had no rational connection with the purposes of the TWEA. President Johnson's Executive Order recites as authority for his action "the continued existence of the national emergency declared by Proclamation 2914 of December 16, 1950." To the general public, that must have sounded like the usual boiler plate. In fact, the reference was to the proclamation issued by President Truman when the Chinese Communists crossed the Yalu River 17 years earlier to repulse American forces in North Korea[14]—hardly related to the crisis of the dollar following the devaluation of the pound in November, 1967. Moreover—and this is one of the recurring weaknesses of action under section 5(b) and under other emergency of national security powers [15]—President Johnson's action was not a 60-day or 90-day emergency program pending Congressional action; the program was kept in force for more than 6 years, tinkered with continually, and used for a variety of purposes (such as foreign economic development) that had to do with the consequences of the program but had nothing (or almost nothing) to do with the emergency justifying the original action.

3. When President Nixon took his dramatic action of August 15, 1971, closing the United States gold window and ending the convertibility of the dollar, he acted without reference to any international or domestic authority. But he also proclaimed an import duty surcharge of 10 percentage points ad valorem on nearly all dutiable goods entering the United States.[16] As we have seen, the delegation of tariff-setting authority by the Congress to the Executive Branch is quite elaborate and precise, and not designed for surprise weekend announcements or across-the-board surcharges. The existence of that legislation, and indeed the Constitutional provision committing the raising of revenue to the Congress (Art. I, § 7, cl. 1) precluded imposition of tariffs just as an exercise of the foreign affairs power. President Nixon did not want to cite the TWEA, not least because a principal target of the surcharge was Japan, and he was scheduled to meet Emperor Hirohito in Alaska a few weeks later on the Emperor's first trip abroad since World War II. Mention of the Trading With the Enemy Act in connection with August 15 would, to say the least, have been

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[9] Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1.

[10] For a vivid account of this episode and the mood of the country at the time, A. M. Schlesinger, Jr., *The Coming of the New Deal*, 1–8 (1959).

[11] See, e.g., *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Federal Energy Administration* v. *Algonquin, SNG*, 426 U.S. 548 (1976); *Teague* v. *Regional Commissioner*, 404 F. 2d 441 (2d Cir. 1968); *Consumers Union of U.S.* v. *Kissinger*, 506 F. 2d 136 (D.C. Cir. 1974); as well as the many cases involving conduct of the war in Southeast Asia. For a convenient citation of these cases, see Dorsen, Bender & Neuborne, *Political and Civil Rights in the United States*, Vol. I, pp. 1533–34 (4th ed. 1976).

[12] Exec. Order 11387 of Jan. 1, 1968, 33 Fed. Reg. 47 (1968).

[13] 15 C.F.R. Part 1000 (1968–74).

[14] Proclamation 2914 of Dec. 16, 1950, 15 Fed. Reg. 9029.

[15] See, for instance, the ever changing Mandatory Oil Import Program inaugurated by President Eisenhower in March 1959 and amended 56 times before finally being eliminated in 1973 and then being revived in 1975 by President Ford.

[16] Proclamation 4074 of Aug. 15, 1971, 36 Fed. Reg. 15724 (1971).

awkward. The President's lawyers, however, were not content with references to trade legislation in the Proclamation raising the duties, especially since imposition of duties was one area in which judicial challenge could be foreseen. Accordingly, they got the President to declare a national emergency, and then to state that he was acting under the authority of the constitution and statutes, "including *but not limited to* the Tariff Act of 1930 and the Trade Expansion Act."

When the judicial challange came—and only then—was the TWEA trotted out as the authority for the action, not by proclamation by the President but in the government's answering papers in court. The Customs Court in the *Yoshida* case did not mind that the authority of the TWEA had been brought in only by the back door after the fact. It held, however, that section 5(b) did not encompass the power to impose duties.[17] The Court of Customs and Patent Appeals agreed with the lower court that none of the provisions of the trade acts covered the President's imposition of the duty surcharge. Nonetheless, it reversed, on the grounds that—

> We find it unreasonable to suppose that Congress passed the TWEA, delegating broad powers to the President for periodic use for national emergencies, while intending that the President, when faced with such an emergency, must follow limiting procedures prescribed in other acts designed for continuing use during normal times.[18]

With all respect, I find this opinion to be a thin one, which should not, and I think will not, go down in history as one of the great efforts to define the scope of Congressional delegation or of the powers of the presidency. It may be that the most important factor in that case—though not mentioned in any of the opinions—was that if the decision had gone the other way, the government stood to lose $540 million in duties collected just in the four months the surcharge was in effect.

4. The import duty surcharge had a curious relationship to the final case I want to mention—the extension of export controls in fall of 1976. When President Nixon had removed the surcharge in connection with the Smithsonian Agreement on currency realignments in December 1971, he had terminated only Paragraphs B and C of the August 15th Proclamation, leaving in place the national emergency declaration in Paragraph A.[19] That emergency, of course, had related to the international economic position of the dollar, and in particular to our loss of monetary reserves. When there was difficulty agreeing on extension of the Export Administration Act, that emergency, as well as the Truman Proclamation of 1950, were recited as the basis for keeping export controls in effect. This happened once in 1972 for about four weeks after which the Export Administration Act was extended (with amendments) as of the original date of expiration; it happened twice in 1974—first over the two-week period of changeover between President Nixon and President Ford, and later for another 4-week period in October.

By the time of the real conflict over the Export Administration Act in the summer of 1976—in particular over the anti-Arab boycott provisions sought to be added by the Congress, resort to the TWEA as a back stop had become routine. With a few numbers and dates changed, President Ford's Executive Order of September 30, 1976[20] is a carbon copy of the three previous orders.[21] When questions were raised about the legitimacy of this step, the Justice Department issued an opinion relying on the decision in *Yoshida* as well as on the precedents set in the earlier, and as it turned out, briefer uses of TWEA to extend export controls.[22]

Several persons have raised the question with me about whether the use of the TWEA to continue export controls is lawful. To a private person contemplating shipping out a strategic item without a license, I would say, "Don't do it."

To a businessman wondering whether he must file the annoying boycott-request forms, I am not so clear, because the link between the stated emergency—whether having to do with the perils of communism or the declining dollar—seems to fit the anti-boycott provisions of our Export Administration Program

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[17] *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155 (Cust. Ct. 1974).
[18] *United States* v. *Yoshida International, Inc.*, 526 Fed. 2d 560, 578 (C.C.P.A. 1975).
[19] Proclamation 4098 of Dec. 20, 1971, 36 Fed. Reg. 24201 (1971).
[20] Exec. Order 11940. of Sept. 30, 1976, 41 Fed. Reg. 43407 (1976).
[21] Exec. Order 11677 of Aug. 1, 1972, 37 Fed. Reg. 15483 (1972). Exec. Order 11796 of July 30, 1974, 39 Fed. Reg. 27891 (1974). Exec. Order 11810 of Sept. 30, 1974, 39 Fed. Reg. 35567 (1974).
[22] Opinion of Asst. Atty. Gen'l Antonin Scalia of Sept. 29, 1976, reproduced in BNA, *U.S. Export Weekly*, Oct. 19, 1976.

even less than it fits the other provisions. I guess I would say to a private person, "Don't be the one to challenge it." But I would say to the government, also, "Try to avoid a court test." And to the successive presidents who have used the TWEA and the lawyers who have gone along with and perhaps even suggested this strategy, I would say—and I hope this Committee would say—that the strategy is of doubtful legality and even more of doubtful propriety. To restate in somewhat different form the point I made at the outset, the reluctance of courts to strike down acts of the President taken in the name of national security is understandable. But this fact should put more, not less pressure on the executive branch and its lawyers to be careful about asserting expansive law-making powers not granted by the Congress. I think in this area we have had too many "can do" lawyers, and too many officials who demand "can do" lawyers. That attitude may be all right in the context where one can say "If we are wrong, a court will overrule us." Where that comfort is lacking—as it largely is in this area—I would hope counsels of restraint gain more respect than the instances I have cited suggest.

IV—SOME LEGISLATIVE SUGGESTIONS

1. One could simply repeal section 5(b) of the TWEA, as H.R. 1560 would do. The difficulty with this approach is that it would bring down with it a number of programs, such as the embargo on trade with Cuba, that perhaps should not be terminated, or should not be terminated just now, or should not be terminated without a quid pro quo. I am not sure what our policy right now should be with respect to Cuba, and I am sure this Committee is not interested in my views on that subject. I say only that it would be a very awkward act (perhaps even an inappropriate interference in negotiations being carried out by the Executive Branch) if the embargo were suddenly to end without any deal or understanding, just because the Executive Branch in prior administrations had from time to time overstepped its bounds.

2. Another possibility would be to retain the delegation of emergency power, but to limit national emergencies to, say, 60 or 120 or 180 days, subject to express renewals. I have some sympathy for this suggestion, which is similar to H.R. 2382. But coming again to the Cuban situation, I can imagine that the President might well not be anxious at a given point to proclaim anew a state of emergency, even as he was negotiating for a relaxation of tensions. Perhaps a modification of the proposal might be developed, whereby an emergency might be extended by the President on the basis of finding continued need, without requiring a new emergency declaration. I would not make such extension of authority unlimited in time, and I would hope it could be tied to some kind of control by the Congress.

3. A modification of the previous proposal, used since 1966 with respect to travel controls,[23] would make the actual measures taken pursuant to the national emergency come up for review at regular intervals, without the need for a new declaration of emergency. The idea would be to compel the government, including the President himself, to think through at regular intervals (say six months) whether extension of measures such as those taken under the TWEA were still justified. I would not want to rule out small modifications, such as were made with respect to China in the period 1969–71, and have been made recently with respect to Cuba. But no new measure, and certainly no measure not linked to the stated emergency, would be permitted without a new declaration of emergency.

4. I believe an amended statute—and I hope it would receive a new name—should make clear that a "state of emergency" in United States law is not an abstract concept such as the stage of siege in some Latin American countries. One should not be able to proclaim an emergency on one subject, then take measures on a wholly unrelated subject that may well not be of an emergency character at all, just because it is convenient to act first and tell the Congress and public later. And it should be clear that a declaration of emergency is not to be made lightly.

5. I believe that if an amended statute, by whatever name, comes out of these hearings, the powers it confers should be limited in their territorial scope to the United States, its citizens acting in their individual (as contrasted with managerial) capacity, and to operations plainly designed to avoid the controls applicable in the United States. I do not say, as is sometimes contended, that our expansive assertions of jurisdiction are contrary to existing international

[23] See 22 C.F.R. § 51.72, issued in 31 Fed. Reg. 13549 (Oct. 20, 1966).

law. But I believe we lose more in receptivity to United States-based investment and in respect for the United States generally than we can possibly gain by the kind of extraterritoriality that we have practiced on and off in the past in implementation of the TWEA.

Mr. Chairman, my statement is already much longer than I had intended. But it is extraordinary how seldom the questions you have raised have been asked in the Congress, and I hope I have been able to contribute to your inquiry.

Mr. BINGHAM. Thank you, Professor Lowenfeld. It is a fascinating statement.

Professor Maier.

STATEMENT OF PROF. HAROLD G. MAIER, VANDERBILT UNIVERSITY SCHOOL OF LAW, VISITING SCHOLAR, THE BROOKINGS INSTITUTION

Harold G. Maier, Professor of Law and Director of Transnational Legal Studies Program, Vanderbilt University Law School, Nashville, Tennessee; born Cincinnati, Ohio, March 25, 1937; B.A., University of Cincinnati, 1959; J.D., University of Cincinnati, 1963; LL.M., University of Michigan, 1964; Luftbrücke Dankstipendiat, Freie Universität Berlin, 1959–60; William W. Cook Fellow, University of Michigan, 1963-64; Ford International Studies Fellow, Institut für Patent-, Urheber-, und Markenrecht der Universität München (now Max-Planck-Institut), 1964-65; full-time member of the law faculty at Vanderbilt since 1965; delegate to State Department—Association of American Law Schools Conference on United States-Yugoslavian Trade and Investment, Belgrade, 1968; participant, Scholar-Diplomat Program, Department of State, 1972; member American Society of International Law (National Chairman, Regional and Local Activities Committee, 1973-74) (member Executive Council since 1975); member, African Law Association; Order of the Coif, Omicron Delta Kappa; author of numerous articles in professional journals dealing with international trade and with the foreign affairs power; Currently a Visiting Scholar at the Brookings Institution, Washington, D.C., conducting research concerning the effect of prior governmental practice on the constitutional powers of the political branches in foreign affairs matters.

Mr. MAIER. Thank you. I consider it a real privilege to be invited to testify before your subcommittee.

As you have asked, I will deal with some of the constitutional issues raised by this continued exercise of emergency powers by the executive branch under section 5(b) of the Trading With the Enemy Act and also the constitutional issues which might be raised by proposed repeal.

I have submitted a written statement to the staff of the subcommittee, and this afternoon I would like, in my oral testimony, to present in summary form an overview of some of the constitutional implications of both the historic and potential future impact of this legislation.

Mr. BINGHAM. Your written statement will appear in full, as will Professor Lowenfeld's.[1]

Mr. MAIER. Your invitation to testify happily permits me to combine two areas of my research and teaching interests.

Much of my teaching over the last 12 years has been in the field of international commercial transactions and in various aspects of public international law. As a visiting scholar at the Brookings Institution here in Washington, I have been engaged for the past

[1] Professor Maier's prepared statement appears on p. 26; Professor Lowenfeld's prepared statement on p. 12.

6 months in intensive research concerning the separation and coordination of constitutional powers in foreign affairs matters, with special emphasis on the interrelationships between the legislative and executive branches in this field.

NATIONAL EMERGENCIES ACT

The importance of reexaming the continued exercise of so-called emergency powers by the executive branch in foreign and domestic affairs was emphasized by the passage of the National Emergencies Act in 1976. That act, as this subcommittee is aware, was designed to terminate those states of national emergency under which Government has been conducted in the United States for the last 40 years and to provide for certain congressional controls in the form of periodic review of executive branch activities under those states of national emergency which might be declared in the future.

The National Emergencies Act, however, exempted section 5(b) of the Trading With the Enemy Act, as well as some other sections of law, from its coverage because so many current regulations, Executive orders and so forth, depend for their legal validity upon the continued existence of the powers which section 5(b) confers. Professor Lowenfeld has mentioned several of those in the course of his testimony.

By that exemption, however, not only were at least two and possibly three existing states of national emergency declared under the Trading With the Enemy Act continued, but all emergency powers which had been or might later be exercised under section 5(b) were excluded from the reporting and override requirements which the National Emergencies Act established. Thus, if the National Emergencies Act is to accomplish the purposes for which it was intended, at least a substantial modification of section 5(b) of the Trading With the Enemy Act is necessary.

CONSTITUTIONAL SHIFT IN POWER

In considering what steps to recommend for modification of section 5(b), I would urge the subcommittee to give primary emphasis to what I submit is a most important constitutional principle. That principle is that in order for an effective "separation" of governmental powers to be maintained together with the equally important system of checks and balances, activities of both the executive and legislative branches must emphasize decisions which will lead to the effective coordination of governmental powers in dealing with matters involving the Nation's foreign economic policy.

Under the constitutional scheme, the framers clearly believed that the country as a whole is best served when the President and the Congress act together in the promulgation and implementation of policy. Abdication of power is not the same as coordination of power. When the authority to exercise powers necessary to the conduct of Government is abdicated by one branch, the constitutional vacuum created by that abdication will be filled by the other. There is no better illustration of this important truth than the legislative and functional history of section 5(b) of the Trading With the Enemy Act.

HISTORY OF SECTION 5(b) USE

The historic interaction of the Congress and the President under section 5(b) provides an excellent illustration of the process by which acquiescence by one of the political branches—in this instance, the Congress—has resulted in a loss of its real and important role in setting of policies and as a partner in executive activity. There has been a consequent shift of constitutional power in matters involving the regulation of foreign commerce from the legislative to the executive branch.

When the Trading With the Enemy Act was originally enacted, it was intended as war powers legislation in connection with the First World War, as Professor Lowenfeld pointed out. It applied only to foreign transactions and conferred no purely domestic powers.

In 1933, President Roosevelt, faced with a domestic economic emergency, cited section 5(b) as a source of power to deal with this domestic emergency and this legal basis for the 1933 Bank Holiday—not only the President's action but his interpretation of section 5(b)—was quickly approved by the Congress. That is certainly understandable under the circumstances. The point is this is now part of the section's legislative history, and leads us down the path I am describing.

Again and again during the Depression and throughout World War II, the executive branch relied upon the emergency powers of section 5(b) to deal with new and important needs, both domestically and internationally, and in each instance, ever-expanding interpretations of executive power were retroactively approved by the Congress; sometimes implicitly, most often by explicit legislative endorsement.

President Truman's declaration of national emergency under section 5(b) during the Korean war has served as the basis for executive action to impose continuing trade embargoes, to prohibit or otherwise regulate certain forms of foreign investment, to impose a tariff surcharge, to freeze foreign-owned assets and to extend upon three different occasions the Export Administration Act after that legislation had expired on a date set by Congress.

I am not suggesting that any or all of these actions by the executive branch have been unwise or that the power has been exercised in an arbitrary or capricious manner. What I am suggesting, however, is that the combination of legislative permissiveness and executive assertiveness over the past 40 years has created a significant shift in the functional allocations of constitutional power to regulate foreign commerce from the legislative to the executive branch.

That the conduct of Government has come to rely upon this delegation of legislative power is made clear by the fact that it was found impossible to terminate executive authority under section 5(b) by means of the National Emergencies Act without considerable further study to determine what, if any, legislative power should or could be reclaimed without seriously injuring the governmental process. In addition, there is every indication that, absent a most serious abuse of the "emergency power" by the executive branch, this broad delegation of legislative authority will be upheld by the courts.

The most recent invocation of section 5(b) by President Ford illustrates the legislative nature of the power which the Congress has conferred. The Export Administration Act expired on September 30, 1976. On October 1, President Ford continued that authority under section 5(b).

Despite some rather general dicta by the Court of Customs and Patent Appeals in the recent *Yoshida* case indicating that there may be certain broad limits on the President's 5(b) powers, I believe that the current state of the law was accurately stated by Mr. Antonin Scalia, Assistant Attorney General, in his letter to the Department of Commerce commenting upon the validity of President Ford's action. Mr. Scalia wrote:

> As a result of continuing interplay between the executive and Congress, section 5(b) has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to "trading with the enemy. * * * We know of no indication of congressional disagreement with the legality of this practice or criticism of it.

If section 5(b) confers the power to continue expired legislation by Executive order, its character as a delegation of legislative power is not in doubt. This amounts to a constitutional change, not in the sense of a formal amendment, but rather in the functional sense that Justice Jackson emphasized in the *Steel Seizure* case when he wrote:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said * * * to personify the Federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.

In other words, where the Congress, the Executive, and the courts all agree on the validity of a practice, that practice is functionally constitutional, regardless of the intent of the framers or the words of the document.

The general issue before this subcommittee is whether this constitutional shift in power is one which should be left in place or whether the legislative branch should reassert itself in this legislative process. Often questions of this kind are stated in terms of reclamation of lost power or of returning to the "original intent" of the framers or even, sometimes, in language which seems to indicate a desire to "punish" the executive branch for the results of a development in which both the legislature and the executive have participated.

Rather, I would suggest a slightly different characterization of the issue. The constitutional issue is, how can the two political branches coordinate their governmental powers so that each bears not only a share of the decisionmaking power, but a share of the responsibility and accountability as well.

The answer is not, I think, to continue the present system under section 5(b). That would result only in a further diminution of the role of Congress in important policy decisions in which it should serve as one conduit for the people's voice.

IMPLICATIONS OF TOTAL REPEAL OF SECTION 5(b)

On the other hand, a total repeal of section 5(b) and a reclamation of all power by the legislative branch, except the purely administrative power, would also not accord with the constitutional scheme. Rather, the search is for workable governance by the combined efforts of the two branches and a continuous involvement by both in the basic policy decisions which energize the lawmaking process. Therefore, I would suggest that outright repeal of section 5(b) without effective substitute legislation would be unwise, both substantively and constitutionally.

I would like to note one or two of the constitutional implications of outright repeal. One of the principal reasons for the growth of executive power, especially in the foreign affairs field, is due to pragmatic considerations. In the increasingly difficult and complex area of international economic relationships and political tensions, certain powers and actions must be taken by the Government in the interests of the Nation. When it becomes evident to the public that some action must be taken, that action will be taken.

To the extent that the Congress does not participate at the outset in establishing guidelines and policies to be considered by the Government when it acts, to that extent Congress creates a constitutional power vacuum and that vacuum is regularly filled by Executive action.

While in the abstract it might be useful to believe that the executive branch peruses all statutory authorizations to determine what powers it may have, and does not act if those powers have not been conferred, that abstract analysis does not comport with reality. When "someone has to do something," the Executive will do it. He may act at his peril in the constitutional sense, but historically, when emergencies have stimulated Presidential action, that action has been approved not only by the Congress but by the American people as well. A complete repeal of section 5(b) would leave the executive branch with whatever inherent "emergency powers" it may have, but without the benefit of congressional guidance in the manner in which those powers should be exercised, in what general circumstances, and under what restrictions.

One issue, then, involves the extent to which the Congress wishes to participate in the continued creation of powers in the executive branch to deal with true emergency situations. It is clearly better constitutional policy for the Congress to set forth in advance those general policies which should control Executive activity in emergencies, especially in time of armed hostilities.

Most of the powers currently made available to the executive branch appear to be ones which are clearly necessary in times of true emergency. So limited, the danger of their continuation in future emergencies without congressional input is prevented by the National Emergencies Act, providing for congressional oversight and termination.

EMPHASIS SHOULD BE ON COORDINATION OF CONSTITUTIONAL POWERS

Thus, one approach to reemphasizing constitutional coordination of governmental powers is the passage of a new act to replace section 5(b) providing emergency powers for the future, subject to the pro-

visions of the National Emergencies Act. An important side effect of such legislation would be to emphasize that the powers in question flow from a legislative delegation, not from the inherent power of the executive branch acting alone.

In addition to the creation of power to act in future emergencies, it may be wise to authorize the executive branch to continue to exercise certain of the powers presently conferred under section 5(b) without regard to emergency situations. To the extent that this is done, I think new legislation should emphasize the coordinate nature of the constitutional powers, rather than their separation. In this connection, I would like to conclude with some observations concerning H.R. 2382, the bill described as the Economic War Powers Act.

If section 5(b) is either repealed or limited to true emergency situations, legislation such as H.R. 2382 is not only appropriate but necessary to continue useful powers of Government in dealing with international economic affairs. I would suggest, however, two constitutional questions raised by H.R. 2382 as presently drafted. The first is that the legislation implies by its silence on the point that the President has an inherent power to impose trade embargoes in non-war-time situations. While I think it is clear that the war powers include the power to embargo trade, I would question the wisdom of Congress implicitly recognizing a power in the executive branch to impose a trade embargo without authorizing legislation in non-war-time conditions.

CONCURRENT RESOLUTION—LEGISLATIVE VETO

The second constitutional question goes to the validity of the concurrent resolution as a device to bind the executive branch once a general trade embargo power is conferred or recognized. Leaving to one side for the moment legislative and executive assertions concerning the constitutional validity of the concurrent resolution as a constitutionally legitimate legislative procedure, comments by most of those constitutional legal scholars who have examined the practice indicate that it is constitutionally doubtful, at best.

Although various reasons for its questionable constitutionality have been given, to my mind the principal constitutional difficulty is that the device denies that coordination of governmental powers which should be a touchstone of the activity of both political branches in this field.

Under the plain language of the constitutional text, set forth in article I, section 7, there are only two procedures by which legislation becomes law. The first is by vote of a majority of both Houses of Congress plus the consent, tacit or express, of the President; the second is by two-thirds vote of both Houses of Congress without Presidential consent.

The wisdom of this constitutional procedure is that it coordinates political activity by requiring, in order to create law, either the consent of both of those branches elected by the people or the overwhelming consent of the legislative branch if it acts alone. That the combined activity of both branches is the desired form is made clear by the Constitution's requirement that a joint approval be sought first before a special legislative majority may enact law on its own. Of course, constitutional change may take place by customary development, accepted by both branches over time as an integral part of the governmental system.

The relatively recent rise of the concurrent resolution technique and the series of legislative-executive disputes over its constitutional validity demonstrates, I believe, that as a customary legal device, it has not yet supplanted the clear textual requirement of coordination in lawmaking activity.

I am not suggesting that the concurrent resolution as a means of achieving that coordination is unconstitutional in all instances. For example, in the legislative reorganization acts, coordination of power is preserved by merely reversing the legislative process and requiring legislative approval, but not amendment, of an executive submission, rather than doing it the other way around.

Regardless of the results of any possible eventual determination by the courts of the constitutionality of the concurrent resolution device, I would suggest that it would be unwise for the Congress to adopt a constitutionally questionable procedure when a much simpler and less controversial method can accomplish the needed purpose of coordination. This is especially true when dealing with the field of foreign affairs in which the executive branch has both a functional and an historic primacy.

The principal difficulty with trade embargoes is not that the Executive imposes them arbitrarily or unnecessarily, but that they tend to be carried on by the inertia of government without periodic review and continued rejustification.

I would suggest that an effective substitute for the attempt to bind the executive branch by concurrent resolution would be a requirement that trade embargoes could be imposed only under stipulated conditions to be found and announced by the executive branch, and then only for 6 months or 1 year at a time, unless the Executive rejustifies the need to continue each embargo. By forcing the Executive to take the administrative step of reexamining existing embargoes and the political step of stating why they should be continued, the Congress would succeed in keeping the existence of embargoes before the public eye. To adopt a device such as the concurrent resolution technique which the Executive has strong constitutional grounds for ignoring could only lead to a further diminution of the influence of Congress in the foreign policy field in the long run and is especially dangerous in a situation in which a popular Chief Executive might combine his personal political strength with a strong constitutional argument.

This really only scratches the surface of the issues involved. I hope it has been helpful to the subcommittee.

Again, I feel myself very privileged to have the opportunity to address these matters.

[Professor Maier's prepared statement follows:]

PREPARED STATEMENT OF PROF. HAROLD G. MAIER, VANDERBILT UNIVERSITY SCHOOL OF LAW, VISITING SCHOLAR, THE BROOKINGS INSTITUTION

These comments deal with some of the constitutional issues relevant to this subcommittee's consideration of two pieces of proposed legislation: H.R. 1560, a bill to repeal section 5(b) of the Trading With the Enemy Act of 1917, and H.R. 2382, a bill to limit the imposition of trade embargoes (also known as "The Economic War Powers Act"). In the course of this discussion, I will suggest three general conclusions. The first is that unless section 5(b) of the Trading With the Enemy Act (hereinafter TWEA) is either repealed or substantially modified, efforts by the Congress during the past few years to regularize the law-making process by returning the country to a state of "nonemergency" gov-

ernment will be substantially weakened. The second conclusion is that the history of executive practice and congressional acquiescence in that practice over the past forty years under section 5(b) has resulted in a substantial shift in the constitutional allocations of power in this area between the legislative and executive branches. Lastly, I suggest that by a combination of amendment to section 5(b) and by the passage of additional parallel legislation, Congress can take significant steps toward improving that coordination of governmental powers in the foreign trade field which is essential to the smooth and constitutionally proper functioning of the two political branches in this important area. In that context I submit a few comments concerning certain constitutional considerations raised by H.R. 2382.

In 1976, Congress passed the National Emergencies Act, Public Law 94–412, to accomplish two principal goals. One goal was to terminate existing states of national emergency still in effect by virtue of unrescinded Presidential proclamations; the other was to establish procedures for terminating future declarations of national emergency, either by concurrent resolution of the Congress or by executive proclamation. This Act, which became law of September 14, 1976, was passed after a three-year study by a Special Committee on National Emergencies and Delegated Powers of the United States Senate. During its study, that Committee found that since 1933, Congress had passed or recodified over 470 statutes delegating to the President law-making authority based on the declared existence of emergency conditions. During that same period, five "temporary" states of general national emergency had been declared by various Presidents in 1933, 1939, 1941, 1950, and 1971. Three of these states of emergency, those of 1933, 1950 and 1971 are still in existence and those declarations bring into effect the powers conferred by section 5(b) of the TWEA.

The Senate Committee's study made it clear that large body of existing regulations, executive orders and decrees depended for their legal validity upon the continuing existence of a declared state of national emergency. Thus some states of emergency could not be terminated by the National Emergencies Act without further study of the effect of removing statutory authorization on the continuing implementation of important governmental policies. Consequently, section 502(a) of the National Emergencies Act exempted from its provisions several existing emergency powers statutes. section 502(b) directed further congressional study and recommendation concerning the utility or necessity of continuing these "emergency" powers. One of the provisions exempted from the coverage of the National Emergencies Act was section 5(b) of the Trading With the Enemy Act. Another was section 95a, 12. U.S.C. which is identical to section 5(b) ; TWEA.

The effect of excluding section 5(b) from the coverage of the National Emergencies Act was not only to continue the states of emergency of 1933, 1950 and 1971 which had been declared under it, but to exempt any powers currently being exercised by the executive branch by virtue of these declarations from the oversight and termination provisions of the National Emergencies Act. The practical and legal effect of this exclusion was to substantially weaken the effect of the National Emergencies Act. As long as section 5(b) remains in the statute in its present form, the executive branch can exercise many of the "emergency" powers which it had exercised before the passage of the 1976 legislation exactly as it has for forty years. The decision to exempt section 5(b) from the National Emergencies Act pending further study was essential because much activity of government, especially in the foreign trade field, has come to depend upon the statutory authorization provided by section 5(b) together with the continuing existence of declared national emergency status triggering those powers.

To establish the context of this subcommittee's study, I think it is important to note that section 5(b) does not grant to the President the power to declare a national emergency. Rather, section 5(b) gives special legal effect to such a declaration by bringing into operation congressionally authorized power to be exercised by the President during the time that the national emergency status continues. Furthermore, the executive branch does not need statutory authorization to act in specific situations to deal with emergencies when the exigencies of the moment require such action. When the executive acts in this way, he acts at his peril. He must justify his acts on the basis only of whatever inherent authority he may have in the light of the situation in the context of which his emergency action was taken. Such justification may occur either before the courts or, more likely, to the Congress and, most important of all, to the American people. Therefore, the delegated power granted to the executive

branch by the Congress under section 5(b) is a power in addition to any "inherent" or "implied" power which may reside in the President to act in emergency situation. Thus, a complete repeal of section 5(b) would remove from the President that quantum of power which is conferred by the Congress, leaving him only with whatever "inherent" powers he may have by virtue of his office.

Given this context, I would suggest that any consideration of repeal or revision of section 5(b) needs to take into consideration two important general policy issues. One of these is the extent to which Congressional nonemergency authorization of the exercise of the powers currently available to the executive is desirable to maintain an efficient and executive governmental operation in the fields covered by this statute. The second equally important question is, would abdication by the Congress from the field entirely by outright repeal of section 5(b) without substitute legislation leave a constitutional power vacuum which would be filled by the executive branch acting without authorization in situations where some action might be clearly required by international or domestic circumstances, thus further affecting the constitutional balance.

There is no precise constitutional definition of the extent of executive power to act in emergency situations absent congressional authorization. Because the constitutional validity of any executive emergency action is so closely tied to the nature of the emergency and the circumstances surrounding it, it is virtually impossible to articulate a general constitutional test which would serve as specific guidance for or have binding effect upon a President who identifies the need to take action when an emergency faces the country. Neither of the two most important Supreme Court cases dealing with "inherent" or "implied" powers in the foreign affairs field have attempted to articulate a precise standard. Both emphasized the functional nature of the division of power between the executive and the legislative branches. In *United States* v. *Curtiss Wright Export Corp.*,[1] a case dealing with a presidential proclamation prohibiting export of arms to certain Latin American countries, Justice Sutherland wrote:

"* * * (W)e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations. * * *"

The Court never attempted the impossible task of identifying the quantum of power exercised by each branch and, since Congress had made a clear delegation by a joint resolution, such a definition was unnecessary to the outcome of the case.

When President Truman seized upon Justice Sutherland's reference to "inherent" power to justify his seizure of the steel mills during the Korean War, the Supreme Court struck down the seizure in *Youngstown Sheet and Tube Co.* v. *Sawyer*,[2] often referred to as the *Steel Seizure* Case. The justices wrote seven separate opinions in that case and none of them successfully defined the relative scope of executive and congressional power to deal with emergency situations. Only Justice Black took the absolutist position that there were no "inherent' or "implied" powers in the executive branch to deal with emergencies. Justice Jackson's famous concurring opinion has come to be recognized as expressing the true majority view in the case. He emphasized that the relative powers of Congress and the President were to be determined functionally and were not therefore subject to precise judicial definition. He wrote:

"(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum. * * *

"(2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. * * * In this area, any actual test of authority is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law. * * *

"(3) When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb."[3]

Jackson went on to find that, since Congress had expressly refused to grant to the President seizure authority when it was considering various labor statutes this seizure fill into the third category and was therefore unconstitutional.

[1] 299 U.S. 304 (1936).
[2] 343 U.S. 579 (1952).
[3] 343 U.S. at 635–36.

It is clear that Jackson's three categories describe a process of constitutional law creation, not verbalized constitutional authorizations or prohibitions. That this should be so is particularly appropriate when one is dealing with the constitutional doctrine of separation of legislative and executive power. Seldom do these questions come before the courts and even more seldom, when they do come, are they accepted for adjudication. Thus, it is the political branches themselves who are at once advocates of constitutional legal positions and judges of the propriety of claimed constitutional authorization. It is by this continued process of demand and response that these constitutional legal norms are developed and given content and by the wisdom of their decisions that appropriate coordination as well as separation of constitutional powers is to be achieved. Thus, in a very real sense, the Congress has been, and this subcommittee currently is engaged in a law-making process which has not only statutory but constitutional legal implications. Therefore, one of the principal issues before this committee is raised by the constitutioanl implications of the history of executive-legislative interaction under Sec. 5(b) of the TWEA over the last 40 years.

This history of executive-congressional interaction has resulted in a general delegation of legislative power to the executive branch not only in those areas specifically mentioned in the TWEA but in any other areas that can conceivably be brought within its terms. This result has been brought about by the joint activity of Congress and the executive—the interaction of consistently broad executive interpretations of the power delegated followed by express congressional acquiescence in those interpretations.

Sec. 5(b) as originally passed in 1917 contained no provisions concerning special executive powers for "national emergencies." It was specially designed as war-time legislation for World War I, although it was envisioned, at least by some of its supporters, as providing stand-by authority for use in future wars.[4] Although most other war powers were terminated by legislative act in 1921,[5] the entire Trading With the Enemy Act, including Sec. 5(b) wa retained in force to permit continuing operation of the office of the Alien Property Custodian who still held a large amount of property. In 1933. President Roosevelt invoked the authority of Sec. 5(b) to permit the declaration of a bank holiday to prevent a bank panic and control the export of gold. He did this although Sec. 5(b) specifically exempted "transactions to be executed wholly within the United States" from the scope of the special powers which it conferred. Despite the fact that the authority provided to the President by this legislation was so weak as to be almost non-existent, Congress, when it was called into session, approved the President's action *and* his "interpretation" of Sec. 5(b) retroactively when it passed the Emergency Banking Act or the Bank Conservation Act.[6] In that same act Congress amended Sec. 5(b) to delete the exclusion of domestic transactions from the grant of authority and to insert the provision permitting the exercise of special powers during declared national emergencies which remains in the current statute. President Roosevelt used this authority during the following year to issue a series of executive orders concerning the hoarding of gold and regulating its export.[7] Each of these orders except the first specifically referred to the existence of a state of national emergency. All of these orders were ratified by Congress in the Emergency Banking Act of 1934[8] which incorporated Sec. 5(b) TWEA *in toto*. The Court of Customs and Patent Appeals in an opinion rendered in 1975 wrote that these activities in the early days of the Roosevelt administration clearly expanded the purview of the TWEA from that which encompassed only trading with an enemy in time of war to that which also encompassed dealing with "any" national emergency, including those involving no enemy and no war-related trading.[9]

In September 1939, the President issued another proclamation of national emergency, this time in connection with the beginning of World War II in Europe and United States neutrality. In April, 1940, the President ordered the freezing of all assets in the United States belonging to residents of Denmark and Norway which countries had been invaded by the Germans and on May 7, 1940, Congress,

[4] 55 Cong. Rec. 4907–08, July 10, 1917.
[5] See Ellingwood, *The Legality of the National Bank Moratorium*, 27 NW L. Rev. 923, 925–26 (1933).
[6] 48 Stat. 1.
[7] Exec. Orders 6073, March 10, 1933; 6102, April 5, 1933; 6111, April 20, 1933; 6260, August 28, 1933; 6560, January 4, 1934.
[8] 48 Stat. 343 (1934, 12 U.S.C. 213 (1970).
[9] *United States* v. *Yoshida International Corp.*, 526 F. 2d 560, 575 (1975).

by joint resolution, approved the President's actions retroactively to remove any doubt of their validity. World War II went on, The President issued additional freeze orders concerning property of residents of other countries. In 1942 he delegated to the Secretary of the Treasury the authority to issue regulations concerning frozen assets. This authority is today the basis for blocking trade and financial transactions with North Korea, Cuba and North Vietnam. On May 27, 1941, President Roosevelt issued another declaration of national emergency and, based on this declaration, he ordered the Federal Reserve Board to impose consumer installment credit controls.[10] In doing so, the President broadened substantially the definition of "banking institutions" in Sec. 5(b) to include any person who extended credit. In December, 1941, Congress in the First War Powers Act [11] approved all prior actions taken under Sec. 5(b), thus approving the President's new definition of "banking institutions". In 1947 the Congress, by joint resolution, removed the Federal Reserve Board's consumer credit power, in 1948 it restored it, in 1950, after that renewal had expired, it restored the authority again under the Defense Production Ace [12] and then, by repealing that section in 1952, appeared to remove the FRB's authority over consumer credit once more. In each instance, the Congress continued, however, the authority of the Federal Reserve Board to regulate consumer credit in time of national emergency or war. The National Emergencies Act of 1976 finally formally repealed the 1947 joint resolution.[13]

In 1950, President Truman declared yet another national emergency based on Sec. 5(b), this time in connection with the Korean War. In 1968, President Johnson invoked President Truman's 1950 declaration as the basis for instituting the Foreign Direct Investment Program. Then Attorney General Ramsey Clark in an opinion supporting the President's program cited historic precedent under Sec. 5(b) for thirty-five years and acts of Congress and judicial decisions sustaining the President's authority to use the act in this manner. In doing so he drew an analogy between Roosevelt's actions to control the outflow of gold and President Johnson's attempts to restrict the foreign holdings of dollars.[14]

In 1971 President Nixon declared a national emergency and citing "the Tariff Act, the TEA (Trade Expansion Act) and other provisions of law * * *" imposed additional duties on imports to protect the United States balance of payments position. When a suit challenging this authority was brought, the President argued that "other provisions of law" included Sec. 5(b) of the TWEA and it was on this provision that the court relied in upholding the validity of the import surcharge.[15] in 1972 [16] and again in 1974 [17] President Nixon used Sec. 5(b) to continue the operation of the Export Administration Act of 1969 after that statutory authority had expired upon a date fixed by the Congress.

This brief history of Sec. 5(b) demonstrates that, regardless of the original intention with which the TWEA was passed, Sec. 5(b)'s effect is no longer confided to "emergency situations" in the sense of existing imminent danger. The continuing retroactive approval, either explicit or implicit, by Congress of broad executive interpretations of the scope of powers which it confers has converted the section into a general grant of legislative authority to the President permitting the executive branch by order, rule and regulation to make law concerning almost any subject matter which can conceivably be brought within the terms of Sec. 5(b). Sec. 5(b) permits the President to define any of the terms of the section. Only an outstanding declaration of the existence of a "national emergency" as defined by the President to bring those powers into being.

The most recent invocation of Sec. 5(b) by President Ford illustrates the legislative nature of the power conferred. The Export Administration Act expired once again on September 30, 1976. On October 1, President Ford continued that authority under Sec. 5(b). Despite some rather general dicta in the *Yoshida* [18] case indicating that there may be certain broad limits on the President's 5(b) powers, I believe that the current state of the law was accurately stated by Mr. Antonin Scalia, Assistant Attorney General in his letter to the Department

[10] Exec. Order 8843.
[11] 55 Stat. 839.
[12] 64 Stat. 812.
[13] Sec. 501(c).
[14] 42 Opinions of Atty. Gen. No. 35.
[15] *Supra* note (9).
[16] Exec. Order 11677.
[17] Exec. Order 11796.
[18] *Supra* note 9.

of Commerce commenting upon the validity of President Ford's action. Mr. Scalia wrote:

"As a result of continuing interplay between the Executive and the Congress, Section 5(b) has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to 'trading with the enemy.' * * * We know of no indication of Congressional disagreement with the legality of this practice or criticism of it."[19]

Thus today, Sec. 5(b) and executive activities under it fall squarely within Justice Jackson's first category—the President's constitutional authority is at its maximum "pursuant to an express or implied authorization of Congress." In other words, the combination of legislative permissiveness and executive assertiveness over the past forty years has created a significant shift in the functional constitutional allocations of power to regulate foreign commerce from the legislative to the executive branches. Except in the case of a most serious abuse of this "emergency" power by the executive branch, this shift in authority will be upheld by the courts.[20]

Congress now is setting out to consider whether this constitutional shift is one which should be left in place or whether the legislative branch should reassert itself in this legislative process. Often questions of this kind are stated in terms of reclamation of lost power or of returning to the original intent of the framers or even, sometimes, in language which seems to indicate a desire to "punish" the executive branch for the results of a development in which both the legislature and the executive have participated. Rather, I would suggest a slightly different characterization of the issue. The issue is how can the two political branches constitutionally coordinate their governmental powers so that each bears not only a share of the decision-making power but a share of the responsibility and accountability as well for the decisions which are made. The answer is not, I think, to continue the present system under Sec. 5(b). That would result only in a further diminution of the role of Congress in important policy decisions in which it should serve as one conduit for the people's voice. On the other hand, a total repeal of Sec. 5(b) and a reclamation of all power by the legislative branch, except the purely administrative power, would also not accord with the constitutional scheme. Rather, the search is for workable governance by the combined efforts of the two branches and a continuous involvement by both in the basic policy decisions which energize the law-making process.

In amending or supplementing Sec. 5(b) there are two separate but equally important issues. One involves the extent to which the Congress wishes to participate in the continued creation of powers in the executive branch to deal with true emergency situations. Even though some "inherent power" exists in the President to respond to emergency situations, it is clearly better statutory and constitutional policy for the Congress to set forth in advance those general policies which should control executive activity in emergency situations, especially in time of military hostilities. A well thought out congressional policy including reporting requirements and effective limits not only preserves congressional oversight but combines the sanction of both political branches to strengthen the government's hand in dealing with emergency situations. In addition, a preordained policy would go far toward preventing the kind of piece-meal expansion of "emergency" power which we have witnessed brought on by necessarily hasty action in response to difficult current circumstances. The National Emergencies Act clearly applies to emergency situations. The powers currently conferred by Sec. 5(b) seem to be appropriate ones when true emergencies exist. Therefore, to the extent that Sec. 5(b) powers are not conferred for general use, they should be continued as residual powers which can be called into operation when the need arises.

It may, however, be wise to authorize the executive branch to continue to exercise certain of these powers without regard to emergency situations. To the extent that this is done, I think new legislation should emphasize the coordinated nature of the constitutional powers, rather than their separation. In this connection, I conclude with some observations concerning H.R. 2382. If

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[19] Letter from Antonin Scalia, Asst. Atty. Gen., Office of Legal Counsel, to J. T. Smith, General Counsel, Dept. of Commerce, Sept. 29, 1976, in BNA, International Trade Rep., U.S. Export Weekly No. 128, Oct. 19, 1976.

[20] See e.g. *United States* v. *Yoshida International Corp., supra* note 9; *Teague* v. *Regional Commissioner of Customs*, 404 F. 2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 ( ); *Sardino* v. *Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), cert. denied, 385 U.S. 898 (1966).

Sec. 5(b) is either repealed or limited to "true" emergency situations, legislation such as H.R. 2382 is not only appropriate but necessary to continue effective powers of government in this field. I would suggest, however, that substantial doubts correctly exist concerning the constitutional validity of one of the mechanisms of this proposal—the proposed use of the concurrent resolution as a law-making device to bind the executive branch once the general trade embargo power is conferred. Several constitutional legal scholars have suggested various reasons why the use of the concurrent resolution technique as a form of legislative veto over executive action may be unconstitutional.[21] The principal constitutional problem with the device, to my mind however, is that it denies that coordination of governmental powers which the constitution clearly envisions.

Under the plain language of the constitutional text, set forth in Article I, there are only two procedures by which legislation becomes law. The first is by vote of a majority of both Houses of Congress plus the consent, tacit or express, of the President; the second is by two-thirds vote of both Houses of Congress without Presidential consent. The wisdom of this constitutional procedure is that it coordinates political activity by requiring the consent of both of those branches elected by the people to create law, or the overwhelming consent of the legislative branch if it acts alone. That the combined activity of both branches is the desired form is made clear by the constitution's requirement that a joint approval be sought first before a special legislative majority may enact law on its own. Of course, constitutional change can take place by customary development, accepted by both branches as an integral part of the governmental system. The relatively recent rise of the concurrent resolution technique and the series of legislative-executive disputes over its constitutional validity demonstrate, I believe, that as a customary legal device it has not yet supplanted the clear textual requirement of coordination in law-making activity. Especially in the field of foreign affairs in which the executive branch has both a functional and historic primacy, I think it would be unwise to adopt a constitutionally questionable procedure when a much simpler and less controversial approach can accomplish the needed purpose.

The principal problem with trade embargoes is not that the executive imposes them arbitrarily or unnecessarily, but that they tend to be carried on by the inertia of government without periodic review and continued rejustification. I would suggest that an effective substitute for the attempt to bind the executive branch by concurrent resolution, would be a requirement that trade embargoes could be imposed by the executive branch under stipulated conditions for no more than six months or perhaps one year at a time without a reexamination and rejustification of the need to continue each embargo. By forcing the executive to take the administrative step of reexamining the existing embargoes and the political step of stating why they should be continued, the Congress would succeed in keeping the existence of the embargoes before the public eye and before its own eyes, for that matter. To adopt a device such as the concurrent resolution technique which the executive has strong constitutional grounds for ignoring could only lead to a further diminution of the influence of Congress in the foreign policy field in the long run and is especially dangerous in a situation in which a popular chief executive could combine his personal political strength with a strong constitutional argument.

Mr. BINGHAM. Thank you very much for a most interesting statement.

Professor Metzger.

STATEMENT OF PROF. STANLEY D. METZGER, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Stanley D. Metzger received his law degree from Cornell University. He was admitted to the New York Bar and served as an attorney for the New York State Labor Relations Board. He served as the assistant legal adviser for economic

[21] See e.g. R. W. Ginnane, "The Control of Federal Administration by Congressional Resolutions and Committees," 66 Harv. L. Rev. 569 (1953); H. L. Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 Cal. L. Rev. 983 (1975); J. Harris, "Congressional Control of Administration" (1964), at 204–48.

affairs for the Department of State from 1946 to 1960, and then as a professor of law at the Georgetown University Law Center, which position he still holds. From 1967 to 1969 he served as the Chairman of the U.S. Tariff Commission. Professor Metzger is the author of International Law, Trade and Finance, 1962; Trade Agreements and the Kennedy Round, 1964; and Law of International Trade, 1966.

Mr. METZGER. Thank you, Mr. Chairman. Thank you very much for inviting me to make a statement to you on section 5(b).

My experience with section 5(b), my personal and daily experience was from the period 1946 to 1960 when I served in the State Department as Assistant Legal Adviser for Economic Affairs. It fell to me to deal with the Treasury Department on an almost constant basis.

I have followed the matter since then and I have, as everybody does who has been working with a statute for a long time, some ideas about it which I would like to share with you.

USE OF SECTION 5(b) TO BLOCK FOREIGN ASSETS

As has been mentioned, section 5(b) is a very broad grant of power by the Congress to the President. It has been used generally for purposes related to the national security and the conduct of the foreign relations of the United States. By that, I include the economic foreign relations, with the exception of the bank holiday matter referred to by Professor Lowenfeld. Every one of the examples, one way or the other, relates to foreign relations if you include economic foreign relations.

Available to be used in time of war or emergency declared by the President, with no time limitation on the power granted, it authorizes the President to block the assets subject to U.S. jurisdiction of any designated foreign country or resident, and to block any transactions by any person subject to U.S. jurisdiction with any designated foreign country or resident or anyone acting for or on behalf of such a country or resident. The President can do this across the board, as in the China and Cuba controls, or ad hoc, as in the case of the Czech Steel Mill; or he may order a partial asset blocking, as in the case of Egyptian Government assets in 1956.

Because the timing trigger—time or war or Presidentially declared emergency—is so broad and because of the circumstances of the past four decades, in its older pre-World War II form and in its present version, section 5(b) has been continually available for use for the past 44 years without a break. No statement of findings and policy, and no standards to guide its administration are set forth in section 5(b). There is no provision for congressional participation in the decisions to engage in blocking the assets of, or transactions with, a foreign country or countries. There is no provision for congressional consideration whether a particular action remains provident after it is taken, and to terminate it if not. There is no provision for Presidential reporting at intervals concerning actions he has taken under section 5(b), with reasons for his actions. Above all, there is no fixed duration, such as 3 or 4 years, for the existence of the power in order that, in the course of renewal authorization hearings, detailed explanations of actions can be sought and supplied, and amendments that seem to be called for can be made.

Since barebones statutes of this kind in the foreign relations area, and even some in the domestic field, do not run afoul of the "unconstitutional delegation of legislative powers" doctrine of *Panama Refining Co.* v. *Ryan*, these omissions raise no constitutional problem. But they do raise a problem of the wisdom of the decisions implicitly taken which have led to their omission, decisions taken many years ago and only now being seriously reconsidered.

I cannot think of a comparable barebones law in the foreign relations area of the importance of section 5(b). Certainly the trade agreements legislation in force over the past 43 years contains detailed provisions in each of the respects mentioned. Indeed, the Trade Act of 1974, the current law, is so detailed and circumscribed in substantive, procedural, reporting, congressional veto and duration provisions, as to have raised questions of wisdom the other way. Foreign aid legislation, foreign military sales laws, the Public Law 480 surplus agricultural disposal legislation, and many others with which this subcommittee is familiar, also clothe the authority they grant with a full wardrobe of safeguards against arbitrary action.

Now just because something is unique doesn't necessarily make it unwise; circumstances conceivably could justify a standardless, no-limitation, no-reporting, perpetual delegation of great power. I will state my conclusion here and then try to justify it, that circumstances do not justify that kind of a grant of power in section 5(b), despite my belief in the necessity of having a broad grant of power in 5(b) and my opinion that on the whole, the present act has been responsibly employed during the past decades.

The basic security and foreign relations uses of section 5(b) in World War II were to preserve the assets of friendly foreign nations and peoples who were attacked, subjugated and occupied, for their use after liberation and to deny the use of those assets to the enemy, or putative enemy. You needed 5(b) for that purpose and you need 5(b) in the future, if I may say so, because these kinds of things can happen any time. I think it is bootless to say one suddenly relies on inherent authority. I think you ought to have a statute that gives that authority, because these kinds of things can happen tomorrow, next week.

The blocking of assets of neutral countries and the blocking of transactions with occupied and enemy countries served to deny the advantages of trade to the enemy. In addition, the blocked enemy assets could be used for reparation purposes after the war was over. Once the fighting stopped in World War II, a decontrol program for nonenemy assets was undertaken. A certification procedure was worked out with the liberated countries and the neutrals to root out hidden enemy interests in their blocked assets and, importantly, to marshall the dollar assets of the residents of the liberated countries so that the amount of U.S. foreign aid to assist those countries in meeting their balance-of-payments deficits caused by reconstruction efforts could be diminished.

This aspect of the program, the marshaling of assets so the dollars could accrue to the central banks of France, Belgium and the like was the result of Senate initiative—to reduce the burden of Marshall aid.

BLOCKING OF YUGOSLAVIAN ASSETS: 1946–47

The original purposes of the World War II assets and transactions blocking under 5(b) were further expanded in 1946–47. United States-Yugoslav relations were then at a low ebb, consequent upon the dispute concerning Trieste, the downing of some American planes and the nationalization of private American-owned property in Yugoslavia without any realistic prospect of compensation. Section 5(b) was used to continue the blocking of Yugoslav assets in the United States, particularly Yugoslav Government-owned gold valued at about $40 million, in order that the United States would be in a position to use such assets to satisfy American nationalization claims should that prove to be necessary.

As it turned out, it was not necessary. In 1948, there was a major falling out between the U.S.S.R. and Yugoslavia, resulting in the severing of trade and financial links between them. Yugoslavia immediately entered into serious negotiations which resulted in what the U.S. Government considered to be a satisfactory settlement of the claims issue.

CZECH STEEL MILL BLOCKING: 1948

Section 5(b) was used in still another way, connected with foreign relations but much more tangentially, in the Czech steel mill blocking following the 1948 coup.

After the Communist coup of 1948 in Czechoslovakia, relations quickly worsened between the United States and Czechoslovakia. During this process, Czechoslovakia arrested on spying charges an American wire service reporter named William Oatis. As is often the case, this newspaperman's arrest resulted in newspaper headlines and extensive story coverage, and the State Department felt great pressure. It ought to "do something, not just stand there." Not finding a bristling arsenal of usable weapons at hand, thoughts of political officers turned to economic retaliatory measures—section 5(b). Blocking all Czech assets against—they had been decontrolled in agreement with the Benes regime earlier—seemed to be an overresponse.

It happened that Czechoslovakia, prior to the coup, had contracted for the construction of equipment in the United States which would comprise a steel mill, for which they had paid $16 million. That equipment could not be exported to the Communist regime under the Commerce Department's export control orders. But there was nothing to prevent Czechoslovakia from selling the mill to Americans or others to whom it could be exported, thus getting back its $16 million and using the money for whatever purposes it might wish.

The State Department prevailed upon the Treasury Department to ad hoc block the steel mill so that Czechoslovakia could not so secure the proceeds of a sale. The case turned out to be a headache. Treasury had to license the sale of parts in order to defray the storage expenses of warehousemen who became impatient.

After a time this could not be continued without cannibalizing the equipment and thereby rendering it junk. Treasury then, after travail and concern about whether it was lawful, issued a "directive license" to sell the remainder under sealed bids. Argentina was the high bidder—$9 million—and the mill can now be seen at San Nicolas, 150 miles up the River Plate from Buenos Aires. The Czechs took account of

the $7 million shortfall in the negotiation of the United States-Czech claims settlement, which was derailed a few years ago by Congress.

Whether the steel mill blocking in retaliation for Oatis' arrest was a wise use of 5(b) is highly questionable. I thought Treasury was quite justified in its reluctance to see 5(b) used in a manner so tangential to the usual 5(b) uses, for it rightly had a lively appreciation that the surest way to lose power was to abuse it.

CHINA FOREIGN ASSETS CONTROL REGULATIONS: 1950

The next use of 5(b) was traditional. When China's armed intervention in the Korean war occurred in December 1950, as Professor Lowenfeld mentioned, the President imposed on December 16, 1950, the China foreign assets control regulations, an across-the-board blocking of assets and transactions. North Korea was also affected. This control persisted until a few years ago, when, as Professor Lowenfeld mentioned, it was gradually watered down and then eliminated.

PARTIAL EGYPTIAN GOVERNMENT-OWNED ASSET CONTROL: 1956–57

During the 1950's, the only other major use of 5(b) was the partial Egyptian Government-owned asset control of 1956-57. It was less unusual than the Czech steel mill case, but its circumstances were certainly out of the mainline of 5(b) actions. Briefly, Secretary Dulles abruptly withdrew the U.S. portion of a United States-United Kingdom-World Bank offer to finance Egypt's Aswan Dam in the late spring of 1956, after Nasser had made an arms deal with Czechoslovakia and a major trade agreement with Communist China.

Nasser, thereafter, in July 1956, nationalized the assets of the Universal Suez Canal Co., which still had 12 years to go on a concession contract to operate the Suez Canal; he promised to pay the share value on the Paris Bourse as of the day before the nationalization.

There then began several months of diplomacy, during which Mr. Dulles sought, in a variety of ways, to restrain the United Kingdom and France from taking forceful action and to convince Nasser to allow some degree of international control of the operations of the canal. At British-French urging that the United States show some solidarity with their position—the U.S. withdrawal of the Aswan offer, after all, having been the apparently precipitating cause of the nationalization—the State Department pressed Treasury to use section 5(b) so that United States could join the United Kingdom, and France in their shutting off of Egyptian access to foreign currencies.

With reluctance, Treasury imposed blocking controls over Egyptian Government-owned assets only, those within U.S. jurisdiction, on August 1, 1956. No transaction controls were imposed; after acquired assets would thus be free of regulation, as of course would trade. A very, very partial blocking.

United States diplomatic efforts failed. In October 1956, there was a jointly arranged attack on Egypt by United Kingdom, French and Israeli forces. Diplomacy, United States and Russian, halted that effort, a settlement ensued, and in the early spring of 1957, the Egyptian partial asset blocking was lifted.

One further remark related to this episode may be of some interest. When Israeli forces moved across the Sinai in the beginning stages of what appeared to be, even that early, a joint United Kingdom-French-Israeli effort, a fairly high official in the State Department proposed at a meeting that 5(b) be used to block all remittances to Israel. Someone immediately inquired of him whether his proposal encompassed a transaction blocking of Britain and France as well. When he replied that it did not, the chairman, a wise and experienced man, emitted a loud guffaw. That was the end of that one.

These were the major uses of section 5(b) in the 1946–60 period. The later major use—the Cuban assets and blocking control of 1962–63—I don't downgrade the other uses that have been mentioned by Professor Lowenfeld; I consider them to be relatively episodic and less important—which persists to this day, had its own prehistory, with which I am acquainted through newspapers and related public reportage. It was related to the foreign policy and perhaps the security interests of the United States, as perceived by those involved in imposing the controls. I will say no more about it.

LITTLE CONSULTATION WITH CONGRESS

The common denominator of all these experiences of 5(b) use is the seemingly unilateral consideration by the executive branch whether to impose the 5(b) controls. I was unaware of any congressional consultation before the decisions I had mentioned were taken; indeed, I never heard that matter discussed. While this does not necessarily mean that there was no such consultation, however informal, by anyone in the executive branch with anyone in Congress, it is safe to state categorically that there was no institutional, organized consultative mechanism or process for such consultation.

Since no standards or policies were enunciated in the act, and hence no benchmarks by which to measure whether such tangential cases as the Czech Steel Mill or the Egyptian cases were really within the contemplation of the statute, Treasury could be unhappy about them but could not point to statutory limitations to strengthen its hand.

LACK OF REGULAR EXAMINATION

Since, like Ol' Man River, the controls rolled on for 25 years in the case of China and now for 15 years in the case of Cuba with no organized, ongoing mechanism of executive-congressional consultation for their reexamination, no organized effort has been made to examine whether there has been justification for the continued control or the level of the control if some control were thought to be justified. Indeed, there has also been no reexamination until now whether 5(b), in its present form, is necessary or desirable.

The fact that 5(b) was used as relatively infrequently and sensibly as these recitations indicate is a tribute in large part to the good judgment of executive branch officials who resisted efforts to employ it more frequently, with the highest marks going to the Treasury Department. While in the last analysis a great deal depends upon the exercise of such judgment, wise policy indicates that the arc

of judgment should be widened to include representatives of the people in Congress.

RECOMMENDATIONS

In my opinion, section 5(b) is necessary and desirable as a tool of national security and foreign relations. It should not be repealed; it should be amended. I have already indicated most of the kinds of amendments I would advise. Specifically:

(1) An effort should be made to spell out policies and standards in the manner done in the Export Administration Act of 1969 and other statutes in the foreign field.

(2) An effort should be made to spell out a system of advance consultation with relevant congressional committees.

(3) An effort should be made to spell out a system for the use of congressional concurrent resolutions to terminate a control at any time following its promulgation. I assume the constitutionality of such a system until it is declared otherwise, although I am quite well aware of the disputation there has been in this field, because there have been scores of statutes in the past 40 years containing at least this level of congressional disapproval technique taken by the Congress with complete knowledge of the constitutional problem that was involved. The constitutional problem has not been solved in the last 30 years. It is questionable whether it will be in the next 30 years; I have no idea. But it seems to me the presumption, in the light of this history, has to be that concurrent resolutions of this kind are not unconstitutional.

(4) An effort should be made to spell out Presidential periodic reporting—annual or semi-annual—of operations under section 5(b).

(5) By far the most important, a fixed time limit for the exercise of authority under 5(b) should be imposed; perhaps 3 or 4 years. Trade agreements authority and export control authority are so limited. A time limit on authority granted gives Congress a real handle on operations; for there can be none if the act is not renewed. When the act's renewal is sought, a real review can be had and the act can be changed by Congress to reflect new conditions.

(6) Since controls over U.S. exports of goods and technology have been governed by a separate statute for the past 30 years, an amended 5(b) should make clear that it cannot be used for those purposes independently of transaction controls over trade with a designated foreign country.

EXTRATERRITORIALITY

I would only add one further item. I would not agree with the recommendation made by Professor Lowenfeld the effect of which is to limit the section 5(b) powers to the territorial scope of the United States, its citizens acting in their individual as contrasted with managerial capacity, and operations plainly designed to evade the control authority.

When you are operating a full-scale control at a time when political and economic circumstances demand a full-scale control—and before you water it down as years go on—you do not want to have a situation where a San Francisco businessman can open an office in Vancouver and conduct trade to a fare-thee-well where he cannot do so out of

San Francisco. This has been a fundamental and valid argument of Treasury.

Furthermore, so far as foreign countries are concerned, the fact they permit people to engage in trade which we do not authorize and not require it does not necessarily mean that their permission should govern our actions to control our own citizens who have subsidiaries abroad. I do not believe that is any legal requirement that we refrain from doing so. I do not see any moral or practical requirement, either. I can see there can be, and have been problems in foreign relations, but these can be worked out. Usually these problems arise when a control is on its down side after having been in force for a long time and when the steam behind it has long since evaporated.

Thank you very much.

[Professor Metzger's prepared statement follows:]

PREPARED STATEMENT OF PROF. STANLEY D. METZGER, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. Chairman, I was invited by your letter of March 14, 1977, to make a statement concerning the authorities conferred by Section 5(b) of the Trading With the Enemy Act: How they have been used, and my recommendations for changes.

I am Professor of Law, Georgetown University Law Center, having occupied that position since 1960, except for the period 1967–69 when I served as Chairman, U.S. Tariff Commission. Earlier, from 1946–1960, I served in the Legal Adviser's Office of the U.S. Department of State, from 1952–1960, as Assistant Legal Adviser for Economic Affairs. There it fell to me to be in touch constantly with the legal and policy problems of the Treasury Department's administration of the Foreign Funds and, later, the Foreign Assets Control Regulations promulgated pursuant to section 5(b). I have attempted to follow these matters since, both in teaching International Economic Law, and as a member of the Board of Editors of the American Journal of International Law.

Section 5(b) is a very broad grant of power by the Congress to the President. It has been used generally for purposes related to the national security and the conduct of the foreign relations of the United States. Available to be used in time of war or emergency declared by the President, with no time limitation on the power granted, it authorizes the President to block the assets subject to U.S. jurisdiction of any designated foreign country or resident, and to block any transactions by any persons subject to U.S. jurisdiction with any designated foreign country or resident or anyone acting for or on behalf of such country or resident. The President can do this across the board (as in the China and Cuba controls) or ad hoc, as in the case of the Czech Steel Mill, or he may order a partial asset blocking, as in the case of Egyptian Government assets in 1956.

Because the timing trigger—time of war Presidentially declared emergency—is so broad and because of the circumstances of the past four decades, Section 5(b) in its older (pre-World War II) form, and in its present version, has been continually available for use for the past 44 years.

No statement of findings and policy, and no standards to guide its administration are set forth in section 5(b). There is no provision for congressional participation in the decisions to engage in blocking the assets of, or transactions with, a foreign country or countries. There is no provision for congressional consideration whether a particular action remains provident after it is taken, and to terminate it if not. There is no provision for Presidential reporting at intervals concerning actions he has taken under section 5(b), with reasons for his actions. Above all, there is no fixed duration, such as 3 or 4 years, for the existence of the power in order that, in the course of renewal authorization hearings, detailed explanations of actions can be sought and supplied, and amendments that seem to be called for can be made.

Since barebones statutes of this kind in the foreign relations area (and even some in the domestic field) do not run afoul of the "unconstitutional delegation of legislative powers" doctrine of *Panama Refining Co.* v. *Ryan*, these omissions raise no constitutional problem. But they do raise a problem of the wisdom of the

decisions implicity taken which have led to their omission, decisions taken many years ago and only now being seriously reconsidered. I cannot think of a comparable barebones law in the foreign relations area of the importance of Section 5(b). Certainly the trade agreements legislation in force over the past 43 years contains detailed provisions in each of the respects mentioned. Indeed the Trade Act of 1974, the current law, is so detailed and circumscribed in substantive, procedural, reporting, Congressional veto, and duration provisions, as to have raised questions of wisdom the other way. Foreign Aid legislation, foreign military sales laws, the Public Law 480 surplus agricultural disposal legislation, and many others with which this Committee is familiar, also clothe the authority they grant with a full wardrobe of safeguards against arbitrary action.

Just because something is unique doesn't necessarily make it unwise; circumstances conceivably could justify a standardless no-limitation, no-reporting, perpetual delegation of great power. I will state my conclusion here, and then try to justify it, that circumstances do not justify that kind of a grant of power in Section 5(b), despite my belief in the necessity of having a broad grant of power in 5(b) and my opinion that on the whole the present act has been responsibly employed during the past decades.

The basic security and foreign relations uses of Section 5(b) in World War II were to preserve the assets of friendly foreign nations and peoples who were attacked, subjugated, and occupied, for their use after liberation, and to deny the use of those assets to the enemy, or putative enemy. The blocking of assets of neutral countries and the blocking of transactions with occupied and enemy countries served to deny the advantages of trade to the enemy. In addition, the blocked enemy assets could be used for reparation purposes after the war was over. Once the fighting stopped, a decontrol program was undertaken. A certification procedure was worked out with the liberalized countries and the neutrals to root out hidden enemy interests in their blocked assets and, importantly, to marshall the dollar assets of the residents of the liberated countries so that the amount of U.S. foreign aid to assist those countries in meeting their balance of payments deficits caused by reconstruction efforts could be diminished. This aspect of the program was a result of Congressional initiative.

The original purposes of the World War II assets and transactions blockings under 5(b) were further expanded in 1946-47. U.S.-Yugoslav relations were then at a low ebb, consequent upon the dispute concerning Trieste, the downing of some American planes, and the nationalization of private American-owned property in Yugoslavia without any realistic prospect of compensation. Section 5(b) was used to continue the blocking of Yugoslav assets in the U.S., particularly Yugoslav government-owned gold valued at about $40 million, in order that the U.S. would be in a position to use such assets to satisfy American nationalization claims should that prove to be necessary. It turned out not to be necessary. In 1948 there was a major falling out between the U.S.S.R. and Yugoslavia, resulting in the severing of trade and financial links between them. Yugoslavia immediately entered into serious negotiations which resulted in what the U.S. government considered to be a satisfactory settlement of the claims issue.

Section 5(b) was used in still another way, connected with foreign relations but much more tangentially, in the Czech Steel Mill blocking of 1948. After the Communist coup of 1948 in Czechoslovakia, relations quickly worsened between the U.S. and Czechoslovakia. During this process, Czechoslovakia arrested on spying charges an American wire service reporter named William Oatis. As is often the case, this newspaperman's arrest resulted in newspaper headlines and extensive story coverage, and the State Department felt great pressure. It ought to "do something, not just stand there." Not finding a bristling arsenal of usable weapons at hand, thoughts of political officers turned to economic retaliatory measures—Section 5(b). Blocking all Czech assets again—they had been decontrolled in agreement with the Benes regime earlier—seemed to be an over-response. It happened that Czechslovakia, prior to the coup, had contracted for the construction of equipment in the United States which would comprise a steel mill, for which they had paid $16 million. That equipment could not be exported to the Communist regime under Commerce Department's export control orders. But there was nothing to prevent Czechoslovakia from selling the mill to Americans or others to whom it could be

exported, thus getting back its $16 million, and using the money for whatever purposes it might wish.

The State Department prevailed upon the Treasury Department to ad hoc block the steel mill so that Czechoslovakia could not so secure the proceeds of a sale. The case turned out to be a headache. Treasury had to license the sale of parts in order to defray the storage expenses of warehousemen who became impatient. After a time this could not be continued without cannibalizing the equipment and thereby rendering it junk. Treasury then issued a "directive license" to sell the remainder under sealed bids. Argentina was the high bidder ($9 million) and the mill can now be seen at San Nicolas, 150 miles up the River Plate from Buenos Aires. The Czechs took account of the $7 million shortfall in the negotiation of the U.S.-Czech claims settlement, which was derailed a few years ago by the Congress.

Whether the steel mill blocking in retaliation for Oatis' arrest was a wise use of 5(b) is highly questionable. I thought Treasury was quite justified in its reluctance to see 5(b) used in a manner so tangential to the usual 5(b) uses, for it rightly had a lively appreciation that the surest way to lose power was to abuse it.

The next use of 5(b) was traditional. When China's armed intervention in the Korean War occurred in December 1950, the President imposed on December 16, 1950 the China Foreign Assets Control regulations, an across-the-board blocking of assets and transactions. North Korea was also affected. This control persisted until a few years ago.

During the 1950's the only other major use of 5(b) was the partial Egyptian government-owned asset control of 1956-57. It was less unusual than the Czech steel mill case, but its circumstances were certainly out of the mainline of 5(b) actions. Briefly, Secretary Dulles abruptly withdrew the U.S. portion of a United States-United Kingdom-World Bank offer to finance Egypt's Aswan Dam in the late spring of 1956, after Nasser had made an arms deal with Czechoslovakia and a major trade agreement with Communist China.

Nasser, thereafter, in July 1956, nationalized the assets of the Universal Suez Canal Company, which still had 12 years to go on a concession contract to operate the Suez Canal; he promised to pay the share value on the Paris Bourse as of the day before the nationalization. There then began several months of diplomacy, during which Mr. Dulles sought in a variety of ways to restrain the United Kingdom and France from taking forceful action, and to convince Nasser to allow some degree of international control of the operations of the Canal. At British-French urging that the U.S. show some solidarity with their position—the U.S. withdrawal of the Aswan offer after having been the apparently precipitating cause of the nationalization—the State Department pressed Treasury to use Section 5(b) so that the U.S. could join the U.K., and France in their shutting off of Egyptian access to foreign currencies. With reluctance, Treasury imposed blocking controls over Egyptian government-owned assets only, those within U.S. jurisdiction on August 1, 1956. No transaction controls were imposed; after-acquired assets would thus be free of regulation, as of course would trade.

U.S. diplomatic efforts failed. In October 1956 there was a jointly arranged attack on Egypt by United Kingdom, French and Israeli forces. Diplomacy, U.S. and Russian, halted that effort, a settlement ensued, and in the early spring of 1957 the Egyptian partial asset blocking was lifted. One further remark related to this episode may be of some interest. When Israeli forces moved across the Sinai in the beginning stages of what appeared to be, even that early, a joint United Kingdom-French-Israeli effort, a fairly high official in the State proposed at a meeting that 5(b) be used to block all remittances to Israel. Someone immediately inquired of him whether his proposal encompassed a transaction blocking of Britain and France as well. When he replied that it did not, the chairman, a wise and experienced man, emitted a loud guffaw. That was the end of that one.

These were the major uses of Section 5(b) in the 1946–60 period. The later major use—the Cuban assets and blocking control of 1962–63, which persists to this day, had its own pre-history, with which I am acquainted through newspapers and related public reportage; it was related to the foreign policy and perhaps the security interests of the U.S., as perceived by those involved in imposing the controls.

The common denominator of all these experiences of 5(b) use is the seemingly unilateral consideration by the Executive Branch whether to impose the 5(b) controls. I was unaware of any Congressional consultation before the decisions were made; indeed I never heard that matter discussed. While this does not necessarily mean that there was no such consultation, however informal, by anyone in the Executive Branch with anyone in Congress, it is safe to state categorically that there was no institutional, organized consultative mechanism or process for such consultation.

Since no standards or policies were enunciated in the Act, and hence no benchmarks by which to measure whether such tangential cases as the Czech Steel Mill or the Egyptian cases were really within the contemplation of the statute, Treasury could be unhappy about them but could not point to statutory limitations to strengthen its hand.

Since, like Ol' Man River, the controls rolled on for 25 years in the case of China, and now for 15 years in the case of Cuba, with no organized, ongoing mechanism of Executive-Congressional consultation, for their re-examination, no organized effort has been made to examine whether there has been justification for the continued control or the level of the control if some control were thought to be justified.

There has also been no reexamination until now, whether 5(b) in its present form is necessary or desirable.

Indeed, the fact that 5(b) was used as relatively infrequently and sensibly as these recitations indicate is a tribute in large part to the good judgment of Executive Branch officials who resisted efforts to employ it more frequently, with the highest marks going to the Treasury Department. While in the last analysis a great deal depends upon the exercise of such judgment, wise policy indicates that the arc of judgment should be widened to include representatives of the people in the Congress.

In my opinion, Section 5(b) is necessary and desirable as a tool of national security and foreign relations. It should not be repealed; it should be amended. I have already indicated most of the kinds of amendments I would advise. Specifically:

1. An effort should be made to spell out policies and standards, in the manner done in the Export Administration Act of 1969 and other statutes in the foreign field.

2. An effort should be made to spell out a system of advance consultation with relevant Congressional Committees.

3. An effort should be made to spell out a system for the use of Congressional concurrent resolutions to terminate a control at any time following its promulgation. I assume the constitutionality of such a system until it is declared otherwise, which I greatly doubt in the light of scores of statutes in the past 40 years containing at least this level of Congressional disapproval technique.

4. An effort should be made to spell out Presidential periodic reporting—annual or semi-annual—of operations under Section 5(b).

5. By far the most important, a fixed time limit for the exercise of authority under 5(b) should be imposed, perhaps 3 or 4 years. Trade agreements authority and export control authority are so limited. A time limit on authority granted gives Congress a real handle on operations—for there can be none if the Act is not renewed. When the Act's renewal is sought, a real review can be had, and the Act can be changed by Congress to reflect new conditions.

6. Since controls over U.S. exports of goods and technology have been governed by a separate statute for the past 30 years, an amended 5(b) should make clear that it cannot be used for those purposes independently of transaction controls over trade with a designated foreign country.

Mr. BINGHAM. Thank you, Professor Metzger.

I thank all three of you for remarkably interesting testimony.

We will stay for a few minutes. I think we are going to have a series of votes, but we certainly can proceed for about 5 minutes at this time.

I would like to ask each of you the following question. You each have indicated that if there were an extension of section 5(b) there should be some policies and standards established for its use, but none of you really have attempted to spell out what those policies and standards should look like.

Can you take a shot at that? Why don't you speak in the order that you testified.

SECTION 5(B) ACTION SHOULD BE RELATED TO AN EMERGENCY

Mr. LOWENFELD. Well, you are quite right, Mr. Chairman, in pointing out that it is easier to say something should be done than to do it. It is hard to spell out precisely. I think it is probably easier to do it in a negative way. That is, you could say this action or action taken under this authority shall not be used for purposes of economic regulation.

To give you the kind of example that we had, for instance, even in the export control area, some plywood manufacturers on the west coast of the United States were complaining of competition from Japan: The Japanese would buy logs from the Pacific Northwest and make it into plywood and send it back to the United States. Whether that is good or not, I do not know.

I never thought you should use export controls for that purposes. It was not strategic, it was not a danger to the United States in any way. Well, they put export controls in for a while to prevent the logs from going out. I think that was wrong on the export control area. I think it would be wrong to do that under the Trading With the Enemy Act.

There were no shortages of logs. It was a protectionist device. But under the Trading With the Enemy Act, I think you should not do that kind of thing. I think you should not be permitted to take actions or exercise authorities that were granted to other acts which expired, such as the export control program and suddenly fit in an entirely different body of regulations with different delegations, and so on, suddenly just dump it in there.

Third, I think you should make clear that the action must be related to an emergency. I will give you an example which was quite a controversy when I was in the State Department.

In 1965, you may remember, after the Rhodesian independence was declared, the United Nations voted recommendatory, but not yet mandatory, sanctions for about 1 year. The United States thereupon in its export control program put a new category for Rhodesia and controlled nearly all exports.

Then the question was, well, what about imports? We had no such broad authority on the import side. A number of people in the State Department said, why don't we put in the Trading With the Enemy Act and proclaim an embargo? I was then Deputy Legal Adviser, and I wrote an opinion that was criticized, but also praised by some, which said you cannot do that. An import embargo would not come under the United Nations Participation Act, because it is not a decision of the Security Council. It does not come under the Trading With the Enemy Act, because it has nothing to do with the agencies relating to the purposes of the Communists. I believe that was the right decision.

For a year it was hard for people to understand. People at the United Nations thought we were being hypocritical. My view was we were limiting the Trading With the Enemy Act to the purpose for which it was designed and for the emergency for which it was proclaimed.

Now, then, what is the affirmative standard the Congress should prescribe? That is the hardest one to tell. Let me think about it. Maybe I might write you a letter if I can think of a better formulation.

Mr. BINGHAM. I think we better suspend now, but you may be interested to know that what we are going to vote on is whether in

the proposed Reorganization Act there should be a requirement that both Houses approve rather than have a one-House veto.

We will stand in recess.

[A short recess was taken.]

Mr. BINGHAM. The subcommittee will resume its hearing.

We may have another vote shortly, and there are other subcommittees meeting, so I am afraid we will not have much time.

You gentlemen are obviously expert in this field. I would hope at some stage in our proceedings we could either get further views from you in writing or perhaps have another session.

Professors Maier and Metzger, would you comment on my question about standards, with particular reference to the question of whether or not the powers should be limited to emergencies and how would you define emergencies?

MILITARY EMERGENCIES VERSUS ECONOMIC EMERGENCIES

Mr. MAIER. I would like to address myself to that. I think that is a key issue. I think we really are talking about two different kinds of powers. We are talking about the source of powers needed for emergencies, and those powers are the powers which were originally conferred under section 5 when it related to the conduct of military activities abroad.

What one could in effect do is reenact section 5(b) as it was enacted in 1917. That covers military emergency situations. I am not sure that we want standby authority other than whatever inherent authority the President has to act in other emergency situations. I am not sure we want standby authority created by the Congress to act in other kinds of emergencies.

The other kinds I can think of were economic emergencies such as we had in 1933 or act of God emergencies as in the case of hurricanes or vast drought or something of that kind.

For the most part, preexisting legislation to deal with emergencies of that kind, I think, is not necessary. I think the President would act just as he did in 1933—the Congress would come back and see what he had done and say yes or no.

Professor Lowenfeld pointed out many people in the Cabinet level felt Roosevelt should go ahead and declare the bank holiday and say "I am the President and, therefore, the banks are closed." The President felt better with a statutory base. I think it had a major impact on what happened with section 5(b) later because it was the beginning of a very broad interpretation of that section.

I think an emergency statute is very helpful so that it is clear that the President and Congress are acting together, at least in times of military emergencies.

What about the kind of powers that are being exercised currently under section 5(b) and in what is a technical state of emergency, but not the sort of emergency one has when a war is going on or if famine strikes. I see no problem with the Executive exercising the power to embargo trade, or the power to freeze foreign assets.

REPORTING REQUIREMENTS

What I do see as a problem in that there are not sufficient controls in terms of reporting reqirements, constant checks, enough to get both the executive branch and the legislative branch out of the kind of inertia which develops. The current approach is to just let things go along until a problem turns up.

The control element is one, from my point of view, which ought to involve increased interaction. The only way we can get that is by saying to the Executive. "We want to know about it. We want to know that you have looked at it again to make sure you know what you are doing."

I am not sure that responds to your question directly. That is one distinction I see.

Mr. BINGHAM. Professor Metzger.

USE OF ASSET CONTROLS ONLY FOR SERIOUS SITUATIONS

Mr. METZGER. I think there should be 5(b). I think there should be congressional authorization for blocking controls as well as necessary, ancillary, vesting controls for ongoing enterprises, and transaction controls. I think the problem is that the findings and declaration of policy ought to be spelled out in the statute by the Congress. It ought to be spelled in the following general way in response to your question, wholly apart from the other matters of reporting, veto, short term and so forth. I would start with a policy statement that what this country favors is the flow of goods and services across international boundaries and, therefore, there must be an extraordinary situation which calls for controls stopping that. These should be important types of situations of the general character that political or foreign relations crises or national security crises. If Switzerland were to be overrun by its neighbor, you would want to block Swiss assets here until matters were sorted out; you would want to put a block on. You would have consultation before doing it, but you would want to limit your 5(b) authority by language in the statute. Starting from the proposition that the burden is on those who want to do something to stop the flow of goods and services, it could be stopped only when there are serious political or security emergencies, not the kind of thing where you blocked a steel mill because an AP stringer was arrested on a spying charge.

That kind of thing was a nonserious use of 5(b); it was a public relations reaction. Its recurrence is what you want to prevent. I think you can try and do that by indicating in the statute the kind of seriousness with which you view interference and back it up strongly in the committee report.

CONGRESSIONAL INVOLVEMENT

That is the way I would approach it. I would also then add suspenders and belts in the way of organized consultation, concurrent resolution, short term for the statute, and the like. Writing those kinds of things in the statue as well. This would help because when you had

a Secretary of the Treasury who was very dubious about the seriousness of a political event which triggered State Department into requesting action, he would have something to turn to. He would say, I am not supposed to use a sledge hammer to hit a gnat. That is the real point.

Mr. BINGHAM. Thank you.

Mr. Whalen.

Mr. WHALEN. Thank you, Mr. Chairman.

As I understand it, all three of you gentlemen are agreed that this section should not be repealed; is that correct? It should be modified?

CONCURRENT RESOLUTIONS

Two of you, Professor Maier and Professor Metzger, alluded to the desirability of incorporating concurrent resolution provisions. Professor Lowenfeld, I do not believe you touched on that.

Do you have any thoughts with respect to incorporating that kind of provision in any bill modifying 5(b)?

Mr. LOWENFELD. I agree there should be some check by the Congress. I worry about concurrent resolutions, as Professor Maier indicated. I have some doubt about the constitutionality of concurrent resolutions. Perhaps you could accomplish the same thing by having a statute that is subject to renewal, as was attempted to be done with the Export Control Act or the trade legislation. It is only good for 3 years and has to be renewed, with the understanding it will not be renewed if the Congress is unhappy with the way it has gone in the past. I think that may be an adequate check without getting involved with a concurrent resolution.

TIME LIMITATION ON EMBARGOES

Mr. WHALEN. I think you may have also answered my next question with respect to time limitations. I think Professor Metzger proposed there be a limitation. You say there should be one by virtue of a renewal of the act.

Mr. LOWENFELD. I say two things. I would say the legislation itself should be for a period of time and not just permanent. Second, a measure taken under it should have a limited time. And, third, maybe the emergency itself. I think you have three places, each of which should have limits of time.

Mr. WHALEN. Professor Maier, you nodded affirmatively.

Mr. MAIER. I think we are talking now about nonemergency kinds of legislation. We are talking about continuing powers to impose trade embargoes. At least I like to talk in those terms. In that situation, it matches exactly what I was talking about. That is a continuing requirement of reexamination.

Both devices Professor Lowenfeld suggested, I think, achieve that. At the same time they achieve it by continuing review. Nothing "just happens" on the part of either the legislative or executive branch. Power does not disappear without notice it is going to disappear. It goes away if Congress does not like it unless, of course, we have some-

thing like section 5(b) with the Trading With the Enemy Act under which it is continued as happened with the Export Administration Act.

Mr. METZGER. I think what you are searching for is that the authority you grant in the act will not be available unless with respect to each use there is a separately declared emergency related to that use—tying the action to that emergency. That means you could not use the Korean war emergency to justify blocking of Egyptian assets, or blocking a Czech steel mill because of the arrest of Mr. Oatis. It is tailoring your emergency to a particular use, case by case that is needed. If it is not so tailored, the authority does not exist. That is a drafting question.

DEFINITION OF NATIONAL EMERGENCY

Mr. WHALEN. As you have all suggested, and as Chairman Bingham has indicated, the key to this whole situation is a definition of national emergency. The title of the act is Trading With the Enemy Act. This to me suggests military situations during the time of war or during any other periods of national emergency.

As you have suggested, that term "national emergency" has been construed very broadly.

Professor Metzger, you pointed out in most instances use of 5(b) has dealt with international relations, which is quite true. It does seem to me there is an implication in the title of the act, in its reference to "Enemy," that emergency is rather limited in scope. Maybe this is what we ought to do.

Professor Maier, you had mentioned section 5(b) should not really deal with economic emergencies, or incidents as I think you noted, Professor Metzger. In the absence of a declaration of war, obviously there could be diplomatic warfare, and it would seem to me that 5(b) ought to apply to that situation rather than, as you say, the AP reporter example.

Mr. LOWENFELD. Congressman, may I add one thing?

Mr. WHALEN. Yes.

Mr. LOWENFELD. I think it would be useful, and probably would have to be done explicitly, if you could provide for a judicial review of some kind. Of what? I do not think the courts are going to second-guess, as they put it, the President on what is an emergency. But certainly someone affected by a measure ought to be able to go to court and say, "This measure is not related to that emergency," or "that measure is a device to get around a congressional statute which says the opposite or an authority which expired." It is not so easy to draft that.

Maybe what you say is you can get the judicial review, but you do not get an injunction, just a declaratory judgment. You do not want the Government tied up. I believe if you make provision for that, and we have ways to do that in the administrative law system, that would be itself an important check.

Mr. METZGER. You could take care of that by not providing for specific relief, but allowing for a declaratory judgment action alone.

SECTION 5(b) AND FOREIGN SUBSIDIARIES

Mr. WHALEN. I know we are short on time. Maybe I could pose one final question because it does relate to something that our International Relations Committee presently is considering.

Professor Metzger, you say on page 2 of your statement that "section 5(b) is used to block financial transactions by any person subject to U.S. jurisdiction."

I was wondering how far is this applied to U.S. foreign subsidiaries, U.S. persons living abroad, U.S. controlled subsidiaries, and so forth?

Mr. METZGER. Professor Lowenfeld at the outset of his statement laid out five or six items. I think those were all exactly accurate. It does apply to all those situations. The Treasury regulations make this perfectly plain. It always has. My own recommendation is that that should not be tampered with. That is, Treasury should be able to do that. If you are, as I said earlier, running a lock, stock and barrel control for very serious reasons, and it is important—there is a judgment concurred in by the Congress that it is important that it be so, that the last dollar be denied to the Communist Chinese or to whoever, then it seems to me that is what you want and you ought to be able to use this panoply of controls to do that. That is what was done in World War II, and it was done in the major controls thereafter. It was watered down, as I say, at the tag end of a control when the control has long lost its steam and maybe much more serious surgery should have been done on it.

One of the things the Treasury cut back on was the controlled subsidiary abroad. But this was only done long after the steam was out of control. If you are having a lot of steam in your control at the outset and you really want it, I do not see why you should not be able to do it as we have always done.

Mr. WHALEN. Thank you, Mr. Chairman.

SEIZURE OR BLOCKING OF ASSETS: CONSTITUTIONAL REQUIREMENTS

Mr. BINGHAM. Is the finding of an emergency a constitutional requirement for seizure or blocking assets?

Mr. LOWENFELD. I wonder about that, Mr. Chairman, and I think that may be one of the reasons we want emergency legislation. I think if you compare, let's say, on the seizure of assets, we know whether you are an alien or a citizen, you are entitled to the fifth amendment, no property may be taken without due process of law and without compensation. Neither of those tests, it seems to me, is met by the action under section 5(b). In a number of cases, most of them wartime actions, the court upheld the actions because of the needs of war or national emergency.

If you take a case like the *Sardino* case that is mentioned in one of your committee prints, where you have an old man who lives in Cuba and his son is here and dies and leaves a savings account and they will not let him have it, you begin to see at the margin those things are not so attractive. I have doubts whether without some kind of emergency you can do the taking aspect.

Now, prohibitions of transactions where you are not vesting, perhaps you could do without legislation.

Mr. METZGER. Even long-term blocking, it can be a deprivation of property without due process even though it is not a taking. This point was made by Judge Leventhal in the *Neilsen* case, and he narrowly came to the conclusion that it did not apply. Nonetheless, when you get to basics, the fact of having the President declare the emergency, it does not seem to me, is the important factor. Congress could declare it as far as that is concerned.

The question is whether the action is reasonably related to it or whether it has gone on so long the reasonable relationship has been destroyed, at which point it would be considered to be an unreasonable deprivation which is what deprivation without due process means under the circumstances. That is, I think, the way I would analyze the constitutional aspect of it. Do you disagree?

Mr. LOWENFELD. No, I do not, but it suggests emergency legislation gives the power to do things you would not otherwise do.

Mr. METZGER. To the extent you put a time limit on your legislation—3 years—to that extent you eliminate perhaps the necessity of having the President declare it because then you could declare it, if you see my point.

If you have 6 months legislation you may say the Executive is the only one who will declare it.

EMERGENCY AS OPPOSED TO NONEMERGENCY LEGISLATION

Mr. MAIER. I would like to comment on that just to this extent. For one thing, I think it is a mistake to approach what the subcommittee is doing now and what the Congress would be doing in terms of emergency legislation. We are not dealing with emergency legislation. What we have is a situation in which Congress has said if not at the outset, certainly regularly since "Mr. President, if you say there is an emergency, then you can exercise these powers. We do not tell you what an emergency is. We do not tell you how it should be determined. We do not tell you when it should be offered." What you really have is a situation in which the legislative branch has permitted the executive branch to make law in these areas.

I believe the technical existence of an emergency is a reason for the courts' not looking into the substantive of the export control regulations or the freezing of assets regulations.

But I really do not feel a major change would be brought in what the courts would do if the emergency label were taken out. The courts are just as aware as anyone else that there is no emergency in the sense that word is normally used or in the sense it was used in 1917 when the act was first passed.

I think the combination of the foreign affairs power and the acquiescense or the explicit enforcement of Congress as long as reasonable standards were attached, as Professor Metzger suggests, would be enough to save the constitutionality of the blocking of assets.

CUBAN EMBARGO

Mr. BINGHAM. That brings me back to a question I want to ask Professor Lowenfeld. I think you overlooked the fact, Professor Lowenfeld, when you said the repeal of 5(b) would end the Cuban em-

bargo, that in the Foreign Assistance Act of 1961 the Congress specifically authorized the embargo against Cuba, in section 620(c).

Mr. LOWENFELD. I did not mention it. I am not sure I am prepared to plead guilty to overlooking that. I was conscious of that. I was in the State Department at the time, and I drafted the first embargo proclamation.

Mr. METZGER. Using that statute?

Mr. LOWENFELD. Using that statute. And what happened was that goods, particularly cigars, containing Cuban tobacco began to arrive at the Mexican border where they were wrapped with Mexican leaves and then brought into the United States, and the view of the Government was that the Foreign Assistance Act did not prohibit Mexican goods having Cuban ingredients. In order to close that door, you had to either amend the Foreign Assistance Act, which for other reasons the administration was reluctant to do that at that moment, or go to the Trading With the Enemy Act. So that a year before the actual Cuban Assets Controls were imposed across the board, they put those restrictions in. I think also at the time of the embargo, other activities were still authorized.

For example, Pan American was still flying back and forth between Miami and Havana and remittances were going back and forth. You are quite right if you say we could solve the Cuban problem some other way if you want to. That looks like more permanent legislation in some way. But you are right to bring it up.

Mr. BINGHAM. What about the constitutionality of legislation providing for a trade embargo without the underpinning of an emergency?

Mr. MAIER. I think it is constitutional if there are standards set forth in a bill enacted by the Congress, which are reasonable standards in the light of the potential requirements of foreign affairs.

Because, as Professor Metzger pointed out, it is not just any taking that violates the process clause, it is an unreasonable taking or a taking or a deprivation without due process.

BLOCKING AS OPPOSED TO TAKING OF ASSETS

Mr. METZGER. Blocking is not really taking. It is a long-time deprivation question. Long-time blocking can be a deprivation of property without due process. That is a deprivation unless it is a reasonable deprivation. Taking involves compensation, but deprivation does not.

The blocking does not constitute a taking. Query whether a very lengthy blocking would be tantamount to a taking, but a mere blocking has never been considered to be a blocking because you do not transfer title.

Mr. LOWENFELD. What the Trading With the Enemy Act has done is two things. It has prevented transactions. My two colleagues say that is OK.

Mr. METZGER. And freeze the assets.

Mr. LOWENFELD. The other is, it has actually taken assets.

Mr. METZGER. First you freeze the assets and then later, depending on the character, you actually take enemy assets. Take the cases of German property in the United States and Dutch property. Holland was overrun. Dutch property was blocked, never vested, with the ex-

ception of a couple of corporations where you had to change directors. But German property was blocked and then vested. Title was taken by the United States. There was a difference. The mere blocking did not constitute a taking. A vesting did not constitute a taking. It was not compensible because the fifth amendment does not apply to enemy property, so held many times by the Supreme Court. A blocking, however, does not constitute a taking at the time of the blocking.

Query whether a blocking lasting for 20 years results in a "taking." Quite clearly, a blocking represents a deprivation of the use of the property; if that is an unreasonable deprivation, it is a violation of the deprivation clause of the fifth amendment. It is not a violation of the taking clause, however, unless it lasts so long that you hold it tantamount to a vesting. Neither of these have ever been held yet. No court has ever held that either a blocking or a vesting is unconstitutional.

Mr. BINGHAM. I am afraid we will have to bring this session to a close.

I want to again thank all three of you for your valuable help. I think we will be in touch with you again. I know we will.

Thank you.

This session is adjourned.

[Whereupon, at 4:15 p.m., the subcommittee adjourned subject to the call of the Chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

WEDNESDAY, MARCH 30, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met at 1 p.m., in room 2200, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The Subcommittee on International Economic Policy and Trade will be in session.

This afternoon the Subcommittee on International Economic Policy and Trade continues its hearings on "Emergency Controls on International Economic Transactions," currently exercised in large part under the authority of section 5(b) of the Trading With the Enemy Act.

I wish to announce that the hearing scheduled for tomorrow, with Commerce and Justice Department witnesses, has been canceled and tentatively rescheduled for April 20. This would immediately follow a tentatively scheduled appearance by the State and Treasury Departments on April 19. These postponements are granted on the understanding that they will make possible creative, high-level policy thinking on these issues in the administration, which is currently not possible because of the administration's preoccupation with the Export Administration Act and for other reasons.

Today we hear representatives of two private economic policy research groups. Our first witness is Dr. Timothy Stanley, president of the International Economic Policy Association. He will be followed by Mr. David J. Steinberg, president of the U.S. Council for an Open World Economy.

We are glad to welcome you two gentlemen. We will have some conflict problems so we will try to get along as best we can, but I would hope that you can summarize your statements to save us time.

Mr. Stanley.

STATEMENT OF DR. TIMOTHY W. STANLEY, PRESIDENT, INTERNATIONAL ECONOMIC POLICY ASSOCIATION, WASHINGTON, D.C.

Timothy W. Stanley is president of the Washington-based International Economic Policy Association, a nonprofit research group specializing in international business and public policy problems in the economic area.

Prior to joining the Association as executive vice president in 1970, Dr. Stanley was Visiting Professor of International Relations at the Johns Hopkins School of Advanced International Studies, and Research Associate at the School's Washington Center of Foreign Policy Research.

He has served for many years in the U.S. Government, holding several positions in the International Security Affairs area of the Office of the Secretary of Defense; and from 1957 to 1959, he was a member of the White House Staff. He was Defense Advisor of the United States diplomatic mission to NATO, with the rank of Minister, and served from 1965 to July 1969 in Paris and Brussels, where he received the Distinguished Civilian Service Medal. For several months as Special Representative of the Arms Control and Disarmament Agency (ACDA) in connection with the East-West negotiations in Vienna on mutual force reductions; and he continues to advise ACDA as a consultant.

A veteran of two tours of military duty, Dr. Stanley received his A.B. from Yale and an LL.B. and a Ph. D. from Harvard. He is the author of numerous books and articles on international political, economic, and defense policy subjects, including "American Defense and National Security" (1956), "NATO in Transition," (1965), and "Detente Diplomacy: United States and European Security in the 1970's" (1970). He was also a collaborator in the Brookings Institution's study: "U.S. Troops in Europe, Issues, Costs and Choices" (1971), and a co-author of IEPA's 1972 study: "The U.S. Balance of Payments: From Crisis to Controversy."

He has taught at Harvard and George Washington Universities as well as at Johns Hopkins. A native of Connecticut, Dr. Stanley is a member of the Atlantic Council of the United States and a member of the Council on Foreign Relations, the Institute for Strategic Studies and other professional organizations. Dr. Stanley also heads the recently established International Economic Studies Institute, an educational and research organization in Washington which has just published the results of a two-year interdisciplinary study as the book, "Raw Materials and Foreign Policy."

Mr. STANLEY. Thank you, Mr. Chairman.

I will summarize this rather long statement which we submitted in accordance with the suggestions of your staff in trying to analyze the background of this complicated problem.

I very much appreciate the chance to participate in your subcommittee's review of the emergency transaction control authorities. I would like to try to place those authorities in both a short-run and a long-run context.

INSTABILITY IN INTERNATIONAL TRADE

The Trading With the Enemy Act was passed, as everyone knows, in 1917 and last amended in 1941. The world is, of course, quite a different place today than it was at either of those times. Trade, investment, monetary flows, worldwide commodity markets, communications and travel have linked the United States more closely to the global economy. These trends have led our major allies to be even more closely tied to us, and the world as a whole is more interdependent. This trend has been favorable to economic growth, restrictive trading blocs have broken down, and the West's postwar prosperity is related to the progressive dismantling of economic barriers.

Yet, as it has become more interdependent, the world economy in recent years has also become unpredictable, with currency and commodity prices sharply oscillating. Increasingly, contractual and legal obligations have been abruptly broken. For example, in 1975 the Nigerian Government suspended payment on "irrevocable" letters of credit and imposed unilateral contract changes on cement suppliers and shippers, in one stroke throwing parts of the international trading system into turmoil.

Although it is now evident that there were many irregularities in the purchase of cement involved, the methods successfully used by the Nigerians cannot help but increase uncertainty in trade elsewhere. All too often in the recent past similar unilateralism—in oil, in debt, in food, in investment—has become the pattern. When Jamaica unilaterally abrogated its agreements with the aluminum producers, it also sought to withdraw its prior consent to arbitrating the disputes through ICSID—the World Bank's International Center for the Settlement of Investment Disputes.

I think many instances of the instability and uncertainties in international trade today are related to the growing presence of governments in trade and industry. The trend toward state trading organizations, government ownership of basic industry, cartels and other such examples of political power in the world economy has been developing for some time. Now the United States does not need to endorse the desirability of this trend; but we have to recognize it. I think we must make sure that our own economy, which is predominantly private by choice, can be adequately defended in times of national emergency. We have erected some kinds of governmental structures to enable the United States to analyze and act on these developments; but a more coherent and integrated approach is surely needed.

Part of this approach must be the unambiguously clear authority for the President to act quickly in critical emergencies involving the national security. This authority has heretofore been provided under section 5(b) of the Trading With the Enemy Act, even though this law was not intended for this purpose. Thus the issues before the subcommittee must include the question: What is 5(b) to be replaced by—if it is to be replaced—for regrettably such authority will probably be needed again in the future.

EXECUTIVE USE OF SECTION 5(b)

Given the comprehensive testimony you received yesterday, I won't take the time here to review the history of the act, although my written statement does contain a few observations on the subject. Going over to page 6 of the statement, the history does suggest some conclusions relevant to your problem of what to do about reforming this legislation. It seems to me that each use of the act was almost unique. Prospective needs for which it was brought into play had not been anticipated each time the Congress considered particular actions. It has normally been invoked in a crisis, mostly during periods of pressing national emergency of one kind or another and with very little time to consider the long-range implications of what was being proposed.

The executive branch has generally been supportive of the need for the flexibility in emergency powers, and in my view the President has used them reasonably responsibly in the past. Most times that 5(b) has been invoked has involved a genuine or threatened national emergency, broadly defined, and the measures that have been taken have been proportional and usually appropriate to the problem.

One of the things I found interesting in the excellent statements given to you yesterday is that so little mention was made of the use of section 5(b) for the OFDI, the Office of Foreign Direct Investment Controls, which our organization and most others from the economic

and business communities did not like. Apart from the merits of whether they were an appropriate remedy, however, it always struck me as the reductio ad absurdum that the Trading With the Enemy Act was distorted to control capital movements to our friends and allies; and I am frankly surprised that a legal test did not come at that time—I think it should have. My footnote indicates that there were some cases starting to work through the court system, but OFDI was terminated before they got to a final judicial determination.

I indicated earlier that I continue to see dangers in the world economy toward more nationalist behavior—countries trying to maximize their short-term advantages at the expense of multilateral institutions and obligations. We hope that quasi-autarkic conditions will not develop; but there is certainly a disturbing tendency in the recent years.

For example, I think it unlikely but perfectly possible that in a political or an economic crisis the large petrodollar balances which have been built up owing to OPEC's success in cartelizing world oil could be used aggressively. This was a worry at the time of the 1973 war. The shift of the oil producers' holdings out of sterling last spring was one of the major factors, not by any means the only one, but a factor in the pound's rather precipitous decline. Should there be an attack on the dollar or on particular U.S. banks it would require immediate and swift action by the U.S. Government, and the Trading With the Enemy Act currently gives the President such power.

On the other hand, I feel that human nature being what it is, especially bureaucratic human nature, there is a tendency to take emergency action to forestall seeking fundamental solutions to the problems. In a sense we got into the OFDI controls on an emergency basis; but rather than facing up to the underlying balance-of-payments problems and their causes we kept on the controls. Once they were on, it was said to be counterproductive to take them off because that would have encouraged more capital outflows to pay the debts that people had contracted abroad. My point is simply that controls tend to become more difficult to undo the longer they are on.

Finally, I would like to say—and I bring up this point on page 10 of the written statement, that I find it unfortunate that the present administration has apparently decided to deemphasize the Council on International Economic Policy. Obviously the President will use the machinery provided for him by Congress only in accordance with his own personality and management wishes, but Congress did establish this body to help provide a needed long-term overview. It should feel a lot better to have the President make active use of a body like the Council on International Economic Policy in conjunction with any emergency economic actions of the kind we are talking about today, as well as in his general foreign economic policy planning.

RESTRICTIONS ON USE OF EMERGENCY AUTHORITY

I set down in the statement some nine considerations that it would seem to me flow from this analysis and are things that might be elements of a replacement statute for section 5(b) of the Trading With

the Enemy Act. I will just briefly summarize them and then I will conclude.

Emergency authority—and I underscore the word "emergency"—should allow the President to control, prohibit, or regulate export and import trade in goods and services; capital flows, short term and long term; trading accounts; and gold. I think there should be a Presidential certification required that an emergency exists and that national policy requires such measures.

Then the action taken under such a proposed law should be subject to modification or even to repeal by Congress during the 30-day period. I would not require affirmative confirming action, because of all the uncertainties that that would generate; but I think Congress needs and deserves a chance to consider this but within a finite period and with priority consideration as a privileged motion.

I think the law should provide for adequate hearings for both executive branch officials and other interested parties in the private sector as the circumstances permit.

The authorities would be broad as they are now; but in spelling out the powers, for example, to enforce regulations, inspect books, and acquire documentation, I would hope that the policy declaration would encourage minimizing unnecessary and costly paperwork.

On the questions of extraterritoriality we have this dilemma: You do not want people to be able to evade the controls; and at the same time we have learned the hard way, I think, that we do more harm with our allies in trying to extend our own controls to U.S. citizens abroad, especially where you are talking about a minority owned foreign subsidiary. I think in general we should try to stop at the water's edge, but where there are exceptions—and there may have to be exceptions—Congress should encourage maximum consultation with other governments affected.

Most importantly, I believe there should be a cutoff provision. I said 2 years. This is an arbitrary judgment; it could be 3, it could be one. The point is, if the President acts under emergency powers of this kind, he should be required to state that the emergency will expire. I think one could provide for an interim extension, again with the possibility of congressional review and override.

I think this point is important. This administration has talked a lot about zero-based consideration of programs, sunset laws, and so forth and so they should be amenable to having this kind of automatic cutoff. If an emergency, which by definition is something that does not permit time for normal congressional and administrative processes to work, has to last more than 2 years, then it seems to be a questionable emergency.

So to summarize, I recognize the congressional concern. I applaud your subcommittee for raising these fundamental questions which have been ignored for many years. I do not think the Trading With the Enemy Act should be replaced until Congress is sure that new legislation can be enacted which will provide for an effective partnership between Congress and the Executive.

Thank you, Mr. Chairman.

[Mr. Stanley's prepared statement follows:]

PREPARED STATEMENT OF DR. TIMOTHY W. STANLEY, PRESIDENT, INTERNATIONAL ECONOMIC POLICY ASSOCIATION, WASHINGTON, D.C.

REFORM OF THE TRADING WITH THE ENEMY ACT OF 1917

Mr. Chairman, thank you for your invitation to participate in your subcommittee's review of the emergency transaction control authorities embodied in the Trading With the Enemy Act of 1917. I am pleased to appear before your subcommittee today. As you know, the International Economic Policy Association is a nonprofit policy research group which is supported by a select but representative group of American firms with extensive international interests and experience, and which is celebrating its twentieth anniversary next week.

Today I would like to place emergency authorities in both a short-run and long-run context, and I will outline what seems to us to be the necessary elements of a new statutory basis for Executive action in the economic sphere. Since my written statement draws on our research into the historical background, I will submit it for the record and only summarize the key points in the oral statement.

The Trading with the Enemy Act was passed in 1917 and last amended in 1941. The world is, of course, quite a different place today. Trade, investment, monetary flows, worldwide commodity markets, communications, and travel have linked the United States more closely to the global economy. These trends have led our major allies to be even more closely tied to us, and the world as a whole is more interdependent. This trend has been favorable to economic growth, restrictive trading blocs have broken down, and the West's postwar prosperity is related to the progressive dismantling of economic barriers.

Yet, as it has become more interdependent, the world economy in recent years has also become unpredictable, with currency and commodity prices sharply oscillating. Increasingly, contractual and legal obligations have been abruptly broken. For example, in 1975 the Nigerian Government suspended payment on "irrevocable" letters of credit and imposed unilateral contract changes on cement suppliers and shippers, in one stroke throwing parts of the international trading system into turmoil. Although it is now evident that there were many irregularities in the purchases of cement involved, the methods successfully used by the Nigerians cannot help but increase uncertainty in trade elsewhere. All too often in the recent past similar unilateralism—in oil, in debt, in food, in investment—has become the pattern. When Jamaica unilaterally abrogated its agreements with the aluminum producers, it also sought to withdraw its prior consent to arbitrating the disputes through ICSID—the World Bank's International Center for the Settlement of Investment Disputes.

Many of these instances of instability in international markets can be related to the growing presence of governments in trade and industry. The trend towards state trading organizations, government ownership of basic industry, cartels, and other such examples of political power in the world economy has been developing for some time. The United States need not endorse the desirability of this trend in order to make sure that our own economy, predominantly private by choice, is adequately defended in times of national emergency. We have erected some kinds of governmental structures to enable the United States to analyze and act on these developments; but a more coherent and integrated approach is surely needed.

Part of this approach must be unambiguously clear authority for the President to act quickly in critical emergencies involving the national security. This authority has heretofore been provided under section 5(b) of the Trading With the Enemy Act, even though this law was not intended for this purpose. Thus the issues before the subcommittee must include the question: what is 5(b) to be replaced by?—for regrettably such authority will probably be needed again in the future.

The Lessons of the Past

It is instructive to recall that the Trading With the Enemy Act was originally passed after the United States joined the war in 1917, as a distinctly wartime measure. The debate was couched in terms of the immediate wartime needs, even though the language and the debate make clear that the intention was to provide permanent authority for the President to act in future declared wars. The concerns in the debate, control over German-owned patents, assets, and nationals in the United States, were immediate problems. Qualms about the magnitude of the grant of authority to the President were answered by reference

to the ongoing conflict, or, as Representative Romjue put it, "We might as well say now that we are in a war, the most serious war that the world has ever seen, and we must trust someone." [1]

The powers thought to be embodied in section 5(b), however, were for wartime use, at least until their use March 6, 1933 to declare a bank holiday. When Franklin Roosevelt came to Washington in 1933 he already had in his pocket a draft proclamation relying on section 5(b) to close the banks and prohibit the export of gold. The legal basis for using TEA in peacetime was not clear, but the public was behind it. Eleanor Roosevelt described the FDR inauguration as "very, very solemn and a little terrifying," terrifying "because when Franklin got to the part of his speech when he said it might become necessary for him to assume powers ordinarily granted to a President in wartime, he received his biggest demonstration." [2]

The President did invoke wartime powers. He issued a proclamation and closed the banks, asking Congress for retroactive authority 3 days later. This bill permanently authorized the President to use section 5(b) in future peacetime emergencies, and as in 1917, the debate was brief. Members of both Houses acknowledge that they were swallowing their reservations in the interests of the emergency.[3] The bill that few had a chance to read passed the House unanimously and the Senate by a vote of 73 to 7.

In 1940 and 1941 the bill was further amended, in order to deal with the special problems posed by World War II, such as the large European holdings in the U.S. capital markets. Seeking to deflect domestic isolationist sentiment, FDR was the first to change the concept of "emergency," inventing the novel term "limited national emergency" in 1940.

In the postwar period, section 5(b) has been used increasingly for a variety of situations where time was critical. Uses have included tighter prohibitions on U.S. ownership of gold to include gold held abroad (1962), controls over capital transfers abroad (1968), and the regulation of exports (1972, 1974, and 1976). Only the most recent use of the authority (for export control extension in 1976) has been greatly controversial on jurisdictional grounds. And, given the substantial precedents established by Roosevelt, recent Presidents have not found it necessary to go to Congress for amendment of 5(b) or for declarations that previous proclamations "are hereby approved and confirmed."

The International Economic Policy Association objected to the use of the Act's authority to impose a mandatory control program on capital flows to friendly and allied countries in 1968, but on policy rather than jurisdictional grounds.[4] Although there is little question that section 5(b) gives the President the authority to act to control gold and foreign exchange transactions, in retrospect the elaborate system of reporting, controls, and appeals boards established in the Commerce Department from 1968 to 1974 seems to stretch the "emergency" concept.

Several members of Congress sought to have these mandatory controls removed. One approach, represented by H. Con. Res. 85 and 86 introduced by Representative Tunney in 1969, was to declare that Congress considered these controls harmful and "calls upon the President * * * to end such controls at the earliest possible date." Hearings on these resolutions were held in early 1969 [5] and served a valuable educational purpose, but no action was taken.

Representative Thomas Ashley proposed declaring President Johnson's 1968 Executive order "without force or effect" in H.R. 8180 introduced in 1971, but this might have only resulted in another Executive order being issued, and this approach was not pursued.

Finally, Senator Brock in S. 2019 also introduced in 1971 proposed amendment of 5(b) to specifically exempt direct investment transactions with allied coun-

[1] Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency, Subcommittee on International Trade, House International Relations Committee, November 1976, p. 123. (Hereafter "Subcommittee Compilation.")

[2] Quoted in Arthur Schlesinger, Jr., "The Coming of the New Deal" (Boston: Houghton Mifflin Co., 1959), p. 1.

[3] The debate featured statements such as "There are provisions in the bill to which in ordinary times I would not dream of subscribing * * *" and "There are certain passages which I dislike and which do violence to my belief * * * That can be corrected later." Subcommittee Compilation, p. 243.

[4] The validity of the OFDI controls was briefly under challenge in the courts, but (as far as we are aware) the cases became moot when the controls were eliminated.

[5] Foreign Direct Investment Controls Hearings before the Subcommittee on Foreign Economic Policy, Committee on Foreign Affairs, U.S. House of Representatives, March 26 and 27; April 22, 23, 24, 29, and 30; and May 1, 1969.

tries. This too was unsuccessful, in part because the President was slowly liberalizing the controls program after 1969.

This history of the Trading with the Enemy Act usage suggests conclusions relevant to current reform:

1. Each usage of the Act was, in a sense, unique, and prospective needs were unanticipated at the time of congressional consideration.
2. The Act has normally been invoked in a crisis atmosphere, during periods of pressing national emergency, with little time to consider the long-range implications.
3. The executive branch has generally been strongly supportive of the need for the flexibility and emergency powers given by section 5(b) in particular.
4. The President has used 5(b) powers responsibly in the past. Each time 5(b) has been invoked it has been at the end of genuine (or threatened) national emergency, broadly defined, and the measures taken have been proportional, usually appropriate (although in our view, less so regarding OFDI [6]), and fairly administered.

Future Directions for the International Economy

Reform of the emergency transaction control authority logically should proceed with some reference to the possible international economic developments which may necessitate its use. Predicting the future is always hazardous, especially in the light of my earlier acknowledgement that the next need for the Trading With the Enemy Act authority has never been accurately anticipated. But, then, it was also never really attempted!

One possible although clearly undesirable direction for the international economy to move would be towards more lawless, nationalistic behavior, designed to maximize short-term advantages at the expense of the multilateral institutions and obligations so painstakingly built up. Such a world broken into economic blocs and cartels would require that maximum flexibility and authority be in the President's hands in order to defend the economy against the unanticipated effects of foreign actions.

We hope that such a quasi-autarkic future will not develop; but the events of the last several years have shown a disturbing tendency towards occasional lawlessness, monetary crisis, and monopoly. The "economic Pearl Harbor" at the hands of OPEC in 1973 is one example, the Zairian default of 1975 another, and the Chilean expropriations of 1971–72 a third. Neither these actions nor the international monetary crisis of August 15, 1971, necessitated the use of section 5(b) authority,[7] but future such isolated emergencies, even in a basically interdependent world, may call for fast action.

Most disturbing to contemplate of these potential disruptions would be the aggressive use of petrodollar balances to achieve political objectives. Such concerns were expressed at the time of the Arab-Israeli war of 1973; and the liquid and near-liquid balances in Western banks controlled by OAPEC members have grown massively since that time. A shift of oil producers' holdings out of sterling was one of the initiating factors in the pound's fall last year. Any coordinated attack on the dollar or on particular U.S. banks for political reasons would require immediate and swift action by the U.S. Government. The Trading With the Enemy Act currently gives the President such power, and reform should preserve the flexibility to act in situations where normal operations of the financial institutions or the foreign exchange markets are threatened.

This is perhaps the easy case, where the Congress, the financial community, and the general public would be behind the President. It would be somewhat more difficult to act in situations of, say, runaway inflation where demand for a particular commodity (such as gold) for hoarding was disruptive and threatened the economy. Other special situations could be envisaged. And, of course, we must contemplate the prospects of future conflict or near-conflict when the need to control the trade and assets of an enemy, or potential enemy, becomes paramount. In each of these special situations there may indeed be substantial domes-

[6] In the case of foreign direct investment controls, there was a tendency to inaccurately and unfairly choose foreign direct investment as a scapegoat for an acknowledged balance of payments crisis. IEPA's several analytical books on the balance of payments argued against risking the positive earning capacity of direct investments in order to postpone the fundamental readjustments that were necessary (and now have been made).

[7] On August 15, 1971, President Nixon did declare an economic emergency when he imposed the 10-percent import surcharge, but this action was primarily under the authority of the Trade Act of 1930 and the Trade Expansion Act of 1962 (Presidential Proclamation 4074, August 15, 1971).

tic opposition to action, yet firm and definitive action is necessary. Thus, emergency transaction control authority must be designed for immediate activation.

Human nature being what it is, however, the tendency in government (and elsewhere) is always present to take "emergency" action to forestall more fundamental solutions to problems. This seems to have been the approach of the Johnson administration to the building balance of payments deficits and European resentment in late 1967. Direct foreign investment controls were an inappropriate response, however, actually weakening our long-run payments position for short-term gains, but they were imposed under "emergency" authority. Once in place, the controls resulted in the buildup of foreign liabilities by direct investors. The dollar outflow to pay off these very liabilities was then invoked as a new threat to the balance of payments and the prime reason for the very gradual dismantling of the system. In this case, early review of the objectives and effects of direct investment controls might have resulted in a prompt reversal. As time progressed, however, the controls became more difficult to undo.

A final consideration in designing emergency authority for the future should be a bureaucratic one. It is unfortunate that the present Administration has further deemphasized the Council on International Economic Policy (CIEP), although CIEP has been on a declining path ever since the highly successful tenure of its first Executive Director, Peter G. Peterson. IEPA has long supported such a high-level body to coordinate policymaking in the numerous government departments and agencies concerned, and to undertake the forward policy planning in a strategic context that our international economic policies and programs have often lacked. It might be appropriate, therefore, to require the President to convene a full meeting of the CIEP (or similar body performing its functions) before emergency economic actions are taken, to help insure that the mechanism causes all views to be formally considered. Congress certainly has a vital interest in having the President, whoever he may be, provided with the machinery for systematic analysis of all available options. For under our system, the President is the only official with equal responsibilities for both foreign and domestic affairs.

Desirable characteristics of an emergency transactions control authority

It should be clear from the foregoing that the history of section 5(b) is mixed, although mostly successful. There are those, however, who feel that in President Ford's refusal to accept the Export Administration Act Amendments of 1976, the discretionary powers available to him under section 5(b) were abused. We do not share that view; Executive Order 11940 seems an appropriate response to the potential emergency that would have occurred if he had been left without authority to control exports.

The 1968 direct investment controls, however, demonstrate the problems that can be posed when unreviewed "emergency" actions are left standing for years. On a broader plane, the use of old laws for purposes never dreamed of at the time of passage has been criticized as part of the "imperial presidency." [8]

A new legislative basis for emergency action may be appropriate. Based on IEPA's consideration of the issues, an emergency transactions control authority that balances the need for executive authority with the opportunity for national review should include the following nine characteristics:

1. Emergency authority should allow the President to control, prohibit, or regulate export and import trade in goods and services; capital flows, short- and long-term; trading accounts; and gold.

2. Actions regarding these categories could go into effect on presidential certification in each case that an emergency exists; they are to be seen as national policy.

3. Actions taken under (2) should be subject to repeal or modification during a 30-day period by congressional concurrent resolution; but affirmative confirming action should not be required.

4. If it acts, Congress must complete consideration within 30 calendar days, in order to rapidly remove any uncertainty over the measures imposed. Such consideration must be a privileged motion and not subject to procedural delays.

5. Congress should make provision for adequate hearings to consider testimony on measures for executive branch officials and major interested parties from the private sector.

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[8] As in Arthur Schlesinger, Jr., "The Imperial Presidency" (Boston: Houghton Mifflin Co., 1973), p. 320.

6. Authority should be given to control and enforce regulations, including criminal penalties, and the power to inspect books and require documentation should be included. This power should be accompanied by the policy declaration that unnecessary and costly paperwork should be minimized.

7. Power to regulate transactions should not normally extend extraterritorially to controlled foreign subsidiaries of U.S. parents and other persons not subject to primary U.S. jurisdiction; or where an exception is required to avoid evasion of the regulations, provision should be made for consultation with the other governments affected.

8. The President should be required to state a date certain for expiration of measures imposed, unless explicitly renewed. Such a date should be no more than 2 years in the future. That provides ample time for enactment of legislation under normal procedures if such is deemed necessary.

9. The policy section should state that measures taken under this act's authority should be designed to protect the national security, national economy, and international financial system when faced with extraordinary circumstances.

It is our view that such a new statutory basis for emergency economic action would fairly balance the continuing need for the speed and certainty provided under present law with the useful opportunity for early consideration of the significance, impact, need, and side-effects of presidential action through congressional review.

Rather than requiring congressional action, especially when measures are important and broadly agreeable, the formulation proposed here would allow Congress to decide whether to review the President's action, and act where it feels it necessary. This is based on the historical record that most Trading with the Enemy actions have been considered appropriate and necessary at the time, and the practical difficulties in arranging affirmative action on each proclamation at times of acute emergency, when many may be necessary in rapid succession. Such cases could arise in time of war (such as they did in the early months of World War II) or in time of "monetary aggression," which could be triggered by hostile use of foreign exchange surpluses.

The limitation of the authority to those persons under "primary jurisdiction" is important in that we face increasing political objections to U.S. use of foreign subsidiaries as extensions of the U.S. economy and sovereign power. Host nations to our investors are rightly objecting to American attempts to impose our policy on firms organized and operated according to their laws. The use of the Trading With the Enemy Act to control trade by foreign subsidiaries with Cuba is a case in point. It was deeply resented by Canadian and Argentine leaders among others, and fortunately has now been relaxed. This act should, in general, be limited to acts which occur on U.S. soil. Where it is necessary to assert control over foreign actions (such as the control over vital security-related technology under the Export Administration Act) this should be implemented under different and more stringent acts of law, and, as noted above, should involve international consultation.

Finally, the requirement that the President set an expiration date for the action seems useful in order to enable the Executive and the Congress to give "zero-base" consideration to the measures taken. Another 30-day veto period should follow any extension. In general, if "emergency" measures are truly needed for more than two years, they should be embodied in statute.

In conclusion, recognizing the concern of Congress with a statutory basis for emergency actions which goes back to World War I, it may be timely to develop a new authority. But I do not think the Trading With the Enemy Act should be replaced until Congress is sure that new legislation can be enacted which will provide for an effective partnership between Congress and the Executive. I also believe your committee should give some consideration to how the Executive is itself organized to plan and coordinate its foreign economic policy responsibilities. It may not be wise, for example, to allow the statutory basis for the CIEP to expire this summer, although obviously the Administration's own views should be considered.

Thank you, Mr. Chairman.

Mr. BINGHAM. Thank you very much, Mr. Stanley, for a very useful statement, and I appreciate your doing it in such a brief period of time.

Now we will hear from Mr. Steinberg.

STATEMENT OF DAVID J. STEINBERG, PRESIDENT, U.S. COUNCIL FOR AN OPEN WORLD ECONOMY, WASHINGTON, D.C.

B.PH. University of Vermont 1939.
M.A. Harvard Graduate School of Arts and Sciences 1941 (in government and economics).
Army Air Forces—World War II.
U.S. Government service (executive agencies):
Board of Economic Warfare in early 1940's prior to military service.
U.S. Department of Commerce in late 1940's.
Marshall Plan—including 3 years with the Special U.S. Economic Mission to the United Kingdom.
Instructor in American government and constructional law at University of Virginia Extension Division, 1956–1959
Senior international economist for private research organizations, 1955-1960.
Chief trade policy consultant, U.S. Senate Committee on Commerce, 1960–1961.
Chief consultant to the Committee on Trade of the White House Conference on International Cooperation, 1965.
Chief Economist and later Executive Director, Committee for a National Trade Policy, 1961–1974. Principal author of the petition of 5,000 economists (organized in association with former Senator Paul H. Douglas) in opposition to the import quota bills of 1970 and urging a free-trade initiative.
Extensive output of published material, and of statements presented in forums from the Congress to the campuses, includes the following books: "The Sterling Area, An American Analysis" (coauthor), "The U.S.A. in the World Economy" (author), and "Cambodia—Its People, Its Society, Its Culture" (senior author).
Currently President of the U.S. Council for an Open World Economy (organized in 1974), and on the boards of directors of organizations concerned with international cooperation and development. Also Executive Director of the National Council for a Responsible Firearms Policy, which he helped organize in 1967 in cooperation with James V. Bennett, former Director of the Federal Bureau of Prisons.

Mr. STEINBERG. Thank you, Mr. Chairman.

I applaud the Congress' interest and your subcommittee's interest in reassessing section 5(b) of the Trading With the Enemy Act, and I am rather surprised that there has not been more business interest in the need for reform, particularly after the use of that legislation in controlling capital outflows in January of 1968 and the thunderbolt of the import surcharge of August 15, 1971.

SECTION 5(b) AS "SAFETY NET"

I think it is high time that the Government cleaned up the reservoir of emergency economic powers from which many administrations have fished out statutory authority for doing a wide range of extraordinary things which may have been far from the intent of those who enacted those statutes. Section 5(b) has perhaps been the biggest, most attractive find of administrations that have gone on such a fishing expedition. There are times—and the import surcharge of 1971 comes quickly to mind—when section 5(b) has been seized as a safety net when the administration's emergency action has been challenged in the courts, even though this statute was not mentioned specifically as a basis for that action at the time it was taken.

Although there is a need for Executive power to deal quickly with situations that demand quick action, section 5(b) in my view must be

reformed to defuse its potential for serving Presidential whim in situations where more suitable legislative authority, and accompanying Presidential accountability to Congress, do not exist.

"ENEMY" SHOULD BE DEFINED

For some years, Mr. Chairman, I have been saying, and some people thought it was in jest but it was quite seriously and not so much in jest, that one reform in recourse to the Trading With the Enemy Act ought to be that when the President of the United States invokes that legislation he should explain to the Congress and the American people who the enemy is. But such an exercise in truth in packaging is not enough. Section 5(b) and perhaps other provisions of that statute need rigorous realinement with policy needs and with a proper relationship between the President and the Congress at this stage of our Nation's history.

Now I have read your bill, Mr. Chairman, the so-called Economic War Powers Act. I applaud the effort that you have made. I have certain concerns regarding that bill, and I have summarized them here in this statement.

ADMINISTRATION CONSULTATION WITH CONGRESS NEEDED

Put more briefly than I have already put it, I think that the bill should include not just procedures but also standards. It seems to me that there should be standards to which the Congress should adhere in its reassessment of a Presidential embargo as well as standards to which the President must adhere when he imposes such an embargo. We don't want arbitrary action at either end of Pennsylvania Avenue. Although I applaud the whole concept of a Presidential consultation with the Congress, I think that, without putting it in burdensome details, there should be some idea of what form that consultation should take. I have the impression there have been times when a President has talked to certain friendly Members of Congress about a certain matter and regarded that as consultation. I would add that, even if an embargo is sustained by concurrent resolution, there should be a requirement that the President report to Congress periodically on the need and effectiveness of the embargo and on steps being taken to resolve the emergency that warranted the embargo in the first place.

I urge reform of section 5(b) in all its ramifications. I also suggest, this is beyond the purview of your immediate inquiry, that the Congress and the President reassess the whole range of Presidential authority to impose trade restrictions of an emergency nature.

Let me just mention one, and that is the use of import control for national security purposes under the national security clause of the Trade Act. In my view this legislation is faulty legislation because the only remedy that the legislation requires the President to take where he finds impairment of the mobilization base is import control. There is no congressional oversight over how the control is used nor how long it should last and what it costs the country and whether it is really an answer to the problems of repairing the mobilization base.

If there is to be any import control for national security purposes to protect a sector of the mobilization base, then that control should be imposed in the framework of a coherent systematically reviewed policy

of government assistance to that particular sector of our economy. Recourse to import controls in the one instance where the national security clause has been invoked, petroleum, proves the grave inadequacy of that legislation and of the way that it has been used.

Thank you Mr. Chairman.

[Mr. Steinberg's prepared statement follows:]

PREPARED STATEMENT OF DAVID J. STEINBERG,[1] PRESIDENT, U.S. COUNCIL FOR AN OPEN WORLD ECONOMY

I applaud Congressional interest in reassessing Section 5(b), as amended, of the Trading With the Enemy Act of 1917. It is high time the government cleaned up the reservoir of emergency economic powers from which many administrations have fished out statutory authority for doing a wide range of extraordinary things which may have been far from the intent of those who enacted these statutes. Section 5(b) of the Trading With the Enemy Act has been perhaps the biggest, most attractive find of administrations that have gone on such a fishing expedition. There are times—the import surcharge of August 15, 1971 comes quickly to mind—when 5(b) has been seized as a safety net when the Administration's emergency action has been challenged in the courts, even though this statute was not mentioned as a basis for that action at the time it was taken.

Although there is need for Executive power to deal quickly with situations that demand quick action, Section 5(b) must be reformed to defuse its potential for serving Presidential whim in situations where more suitable legislative authority, and accompanying Presidential accountability to Congress, do not exist.

A deterrent to overzealous use of 5(b) would be a requirement that, whenever the President invokes the Trading With the Enemy Act in any way, he must explain to the Congress and the people who the enemy is. But such an exercise in "truth in packaging" is not enough. Section 5(b), and perhaps other provisions of that statute, need rigorous realignment with policy needs and with a proper relationship between the President and the Congress at this stage of our nation's history.

I applaud Congressman Bingham's efforts to this end, reflected in his "bill to limit the imposition of trade embargoes" (H.R. 2382, the Economic War Powers Act). This proposal, however, itself poses problems that need close attention:

1. The bill (as Congressman Bingham noted in his statement to the House on January 26, 1977) "spells out the procedures by which Congress might approve any future trade embargo, and by which Congress could terminate any such embargo at any time." But the bill should establish standards as well as procedures—standards by which both the President and the Congress must abide. Arbitrary ex post facto review and termination or approval of embargoes by Congress should be as assiduously avoided as arbitrary recourse to such measures by the President.

2. The bill requires the President to "consult with the Congress before imposing any trade embargo on any country." Unless the outlines of how such consultation is to take place are added (avoiding burdensome detail), a President may mention his intentions to a few receptive members of Congress and call it "consultation".

3. Even if an embargo is sustained by concurrent resolution (which the bill requires if the embargo is to last longer than 60 days), there should be a requirement that the President report to Congress periodically (in ways the bill should indicate) on the need and effectiveness of the embargo and on steps being taken to resolve the emergency that warranted that action.

I urge reform of Section 5(b) in all its ramifications. I do not recommend its total removal, replaced only by legislation dealing with trade embargoes. I also suggest thorough reassessment of the whole range of Presidential authority to impose trade restrictions of an emergency nature. In some cases, these may be tantamount to an embargo. For example, controls on imports found to be impair-

[1] The views expressed are those of the witness and not necessarily, in every detail, those of the U.S. Council for an Open World Economy or its Board of Trustees. The Council is engaged in research and public education on the merits and problems of achieving an open international economic system.

ing a government program (as under Section 22 of the Agricultural Adjustment Act), and imports found to be impairing national security (the national-security clause of the trade legislation). Without adequate standards, the choice of base periods under Section 22 could unfairly lead to severe trade limitations bordering on embargoes. Under the national-security clause, Congress has mandated only one kind of remedy for import-impairment of national security—import control. This remedy (on which there is no active Congressional oversight), and the absence of a requirement that the weakness in the mobilization base be addressed through balanced, coherent, systematically reviewed programs of constructive assistance, seem hardly to qualify as responsible attention to national-security needs. Recourse to import controls in the one instance where the national-security clause has been invoked—petroleum—proves the grave inadequacy of this legislation and of the way it has been used.

Mr. BINGHAM. Thank you very much, Mr. Steinberg.

Perhaps I should say at this point that both the bills that I have introduced which are before the subcommittee, H.R. 1560 and H.R. 2382, were really intended to stimulate discussion, and I am sure that before this subcommittee is through with this subject we will have developed some legislation that won't look very much like either of these bills.

It is clear to me, for example, after these two hearings that any revision of section 5(b), and such revision is obviously called for, should not be limited to determining when embargos may be imposed because there are all kinds of controls that we are talking about other than embargos.

I find your lists of proposals or of items that might be included in a revision very helpful indeed, Mr. Stanley.

Perhaps as we go along it might be helpful, Mr. Steinberg, if you would comment on the proposals that are made on pages 11 and 12 of Mr. Stanley's paper.

CONGRESSIONAL VETO

One question that occurs to me as I look at your proposals, Mr. Stanley, is why would you limit the period for congressional veto to 30 days initially?

Mr. STANLEY. Well, I should say, Mr. Chairman, these are not really "proposals" on my part, or certainly not on behalf of the organization I head; it is simply a list of things that occurred to us as sensible sorts of things to have in the legislation, if there were to be legislation. I picked 30 days really because it has been sometimes used in legislation. I think there is an argument for having a finite period, and I would certainly defer to your judgment as to what was realistic. It seemed to us, though, that this was a reasonable compromise between just a few days and yet having the thing drag on so the people affected by the law would be uncertain as to what was going to happen to it.

Mr. BINGHAM. You and Mr. Steinberg seem to be in some difference of opinion as to whether the Congress should be given the authority to terminate controls, let's say an embargo, without having to make any findings or without being bound by certain standards. You suggest, as I think at least two of the witnesses did yesterday, that it would be appropriate for the Congress to have that kind of authority to veto emergency action. But Mr. Steinberg, on page 2, says that "arbitrary ex post facto review and termination or approval of embargoes by Congress should be as assiduously avoided as arbitrary recourse to such measures by the President."

In theory that is an honorable principle but I can't think of statutes that provide for congressional veto of Executive actions that require

any kind of justification or even that suggest standards to be followed. Would you care to comment on that?

Mr. STEINBERG. Well, what I put down here on paper, Mr. Chairman, are my quick reactions to the proposal in your bill. I don't know how legislatively feasible it is to do what I have set down here, but I do feel that legislation should set some kinds of standards by which the Congress should judge a Presidential action in this field. I realize what the Constitution says, that Congress has the authority over the Nation's foreign commerce, whether the authority is used arbitrarily or not. Nevertheless sometimes, as in this day and age, when the Congress is trying to correct a kind of distortion that has taken place between the use of Presidential authority and the authority of the Congress, there may in some cases be a tendency for overreaction on Capitol Hill to excessive Presidential use of power. I can understand the feeling in the Congress about correcting the distortions that we have witnessed in recent years. But I think that somehow there ought to be some standards put into legislation so that we get out of the Congress the best possible performance, so that the people know that when the Congress reassessed Presidential action, the Congress took pains to adhere to certain standards.

Mr. BINGHAM. At this point I am going to have to turn over the chair to Mr. Bedell who is in a position to stay through the rest of the hearing. I am sorry that I have another—Now we may have a problem because of the bells that just rang. Well, I think my other meeting won't take place at least for the time being so I will stay for the time being.

Mr. Whalen.

Mr. WHALEN. Thank you very much, Mr. Chairman.

Dr. Stanley, on page 12 your ninth recommendation really poses the problem, the dilemma, which faces us. You state there that:

> The policy section should state that measures taken under this act's authority should be designed to protect the national security, national economy and international financial system when faced with extraordinary circumstances.

I think this touches on what Mr. Steinberg said facetiously, or perhaps not so facetiously. We are talking here about an act labeled Trading With the Enemy, and as Mr. Steinberg said, really who is the enemy? I think the act as written is confusing. We are talking about, on the one hand, war, and on the other the broad concept of national emergency. Since the two are separable, national emergency could deal with anything. You might substitute instead of "national emergency" "during Easter emergency the President would." This is why I think this act has been applied in situations which are really not intended by the original authors of the War Powers Act. So this is what we have to wrestle with as we consider this particular section of the law.

Just one more comment, which really has nothing to do with the bill before us.

Dr. Stanley, you mentioned the present administration's attitude toward CIEP. This really did not begin with the Carter administration; I must confess that it started with the Ford administration. I have some reason to believe that the Ford administration was prepared, had the President been reelected, to make the same recommendations. But, as I say, I think that is another subject apart from this legislation.

CONVERSION TO NONEMERGENCY LEGISLATION

Now getting back, Dr. Stanley, to the question of emergencies, as I indicated you go into impressive detail on how we should handle these emergencies but you say nothing about how we should revamp the laws to deal with what I guess we could call nonemergency situations. Now our task here, as I suggested, is to convert the emergency authorities to nonemergency authorities, as much as possible, while reserving, as you suggest, the necessary emergency authority.

In some of the problems that have been attended to under the guise of 5(b), how do you sort these out? How can we deal with some of these problems which perhaps should have come under other provisions of the law, if indeed these provisions exist?

Mr. STANLEY. This is just one part of the whole panoply of the authority that the President needs and the regulations he puts out under it. I was really here trying not to cover that totality, because I think I am not qualified to do so, but to suggest the balance needed in the exceptions. In other words, there will be cases that cannot be covered or where the administrative discretion given to the President has to be broader than can be accommodated normally or would be desirable normally. What I was trying to do was limit the exceptions, rather than define the whole.

I am not sure that is a totally responsive answer to your question; but that is what I was aiming at in these suggestions.

EXTENSION OF EXPORT ADMINISTRATION REGULATIONS

Mr. WHALEN. With respect to the present Administration's use of Trading With the Enemy Act in lieu of the Export Administration Act that expired, do you see this as a legal alternative, a valid alternative?

Mr. STANLEY. Yes, I do. I think it was necessary to have something, and I think it was unfortunate that the act expired before it could be renewed. But in those circumstances it seems important that the United States, through the executive branch, continues to have authority to control certain kinds of exports for national security reasons, at least "faute de mieux," as the French say. Mr. Steinberg says it was whatever the lawyers could find; but one of the purposes should be to give them a more thoughtful and relevant statutory basis for that kind of action rather than an emergency substitute; but that was the situation that developed. A limited exception like his would at least prevent this kind of "emergency" authority going on for—what are we now, 32 years after World War II, 60 years after World War I.

Mr. WHALEN. Mr. Chairman, I guess we have about 8 minutes to get to the floor so I yield the balance of my time if I have any.

Mr. BINGHAM. We will have to stand in recess.

Will you reconvene the session, Mr. Bedell?

[Whereupon, the subcommittee recessed.]

Mr. BEDELL [presiding]. I think Mr. Cavanaugh is coming back but why don't we go ahead and reconvene the subcommittee. You folks can maybe educate me a little bit while we wait for Mr. Cavanaugh to come back.

I guess the first question I would have—Mr. Stanley, you indicated that you thought the Congress should have a period in which to disapprove the actions of the President. Would that be required in both Houses of the Congress to do so, the same as legislation, or what did you have in mind?

Mr. STANLEY. I think yes. I think it should require some action by both Houses.

Mr. BEDELL. So if one of them voted to disapprove it and the other one did not so vote, it still in effect would be your proposal; is that right?

Mr. STANLEY. Yes.

ALTERNATIVE LEGISLATION

Mr. BEDELL. It gives me a little trouble, that I see some need for authority to take actions under some type of system. It bothers me a little bit that we do it with the Trading With the Enemy Act. Does that give you people some difficulty or does that not seem to trouble you particularly?

Mr. STEINBERG. It troubles me a lot and I think it troubles my colleague, too.

Mr. STANLEY. Yes, I would think that what we are suggesting here as an alternative would take it out of the context of the Trading With the Enemy Act; one could call it the Emergency Transaction Control Act.

Mr. BEDELL. Are you saying that your recommendation would be that we delete this section completely and have a new bill that would give this authority?

Mr. STANLEY. Yes.

Mr. BEDELL. Is that your suggestion, Mr. Steinberg?

Mr. STANLEY. I am not sure I have done enough legal work in the short time available to see what else might be lost out of section 5(b), but for the purposes we are discussing I would like to see this authority with such modifications to the act as may be necessary to continue its basic validity. I would like to see a new Emergency Transactions Control Act and no reference to Trading With the Enemy.

Mr. BEDELL. And repeal section 5(b)?

Mr. STANLEY. Yes.

Mr. BEDELL. Would you agree with that?

Mr. STEINBERG. I would essentially agree with that. I think that it would be wrong just to delete section 5(b).

Mr. BEDELL. And not have other legislation?

Mr. STEINBERG. And not have other legislation.

It also might be useful to look over the whole Trading With the Enemy Act to make sure that the act in its totality and all its provisions adequately serves today's needs. Regardless of whether changes have to be made in sections of the act other than section 5(b), I think that the title of the act ought to be changed so that you have a piece of legislation that has a title such as that proposed by Mr. Stanley—Emergency Transactions Act or whatever it was—rather than the Trading With the Enemy Act. I think that the whole act ought to be looked at again.

Of course, I know that our concern in this hearing is section 5(b) but I want to repeat that although I have great difficulty with section 5(b) as it stands and with the way in which it has been invoked, I don't think it just ought to be jettisoned and nothing put into its place. There is need for a Presidential authority to act quickly in situations that truly demand quick action, and I think both Mr. Stanley and I are in agreement on that basic point.

Mr. STANLEY. Yes.

U.S. COUNCIL FOR AN OPEN WORLD ECONOMY

Mr. BEDELL. You are with the U.S. Council for an Open World Economy? Mr. Stanley indicated that his organization is supported primarily by industrial firms that are interested in what they are trying to do. How are you primarily supported?

Mr. STEINBERG. I have a footnote on my written statement which I would like to repeat here now, and I believe I may have neglected to do so when I first presented my oral testimony. The views I am representing are my own. I think they are basically in accord with the views of my board of trustees whom I have not consulted on this. I am here as a kind of friend of the court in a sense. Our council is supported entirely by private contributions—both corporate contributions, organizational contributions, and personal contributions.

Mr. BEDELL. From what types of people?

Mr. STEINBERG. Well, from individuals who as citizens and consumers believe that an open world economy ought to be a vigorously pursued objective of American foreign economic policy, and from companies that have a stake in that kind of foreign economic policy because they export or because they import or because they have subsidiaries abroad. I wish I had more support from big business than we are now enjoying. In all of the work that our council does, either as a council or as staff people presenting their personal professional judgments, we don't speak for any particular constituency.

We address ourselves only to one standard; namely, what we see as the overall national interest. We thus get involved in situations not because some of our contributors want us to but because we believe the public interest demands it. I have received, for example, Congressman, no correspondence from any of our contributors expressing concern over the Trading With the Enemy Act. This happens to be a concern of mine, and I am pretty sure that when our supporters get copies of what I have said they will be in basic agreement.

OTHER SECTIONS OF THE TRADING WITH THE ENEMY ACT

Mr. BEDELL. Have you studied the rest of the act?

Mr. STEINBERG. No, sir, I have scanned through it.

Mr. BEDELL. Have you, Mr. Stanley?

Mr. STANLEY. Of the whole act?

Mr. BEDELL. Yes.

Mr. STANLEY. I have also scanned it, but I have not studied it carefully.

Mr. BEDELL. You indicated that you thought the rest of the act should be scrutinized.

Mr. STEINBERG. Yes, I did; I think we should do that. Again, everything else may be shipshape and no change necessary, but at least let's satisfy ourselves that we have gone through the whole legislation and that that legislation meets today's needs. I would like to be sure as a citizen that that is the case. So I would like to see scrutiny of the entire act.

Mr. BEDELL. I am advised by staff that the rest of the act is only applicable in times that you are at war.

Mr. STEINBERG. Yes.

Mr. STANLEY. I think that it is important to distinguish between wartime authorities in the classic case of World War I and World War II, where I think this is properly appropriate, and the peacetime controls needed for foreign policy reasons, many of which do not involve wartime situations, except under a very legal or technical definition. We should distinguish the purpose of the Export Administration Act from emergency transactions control, which may be quite unrelated to a warlike situation, but could be a situation of financial panic. It could be a situation, as I suggested in my statement, of use of the petrodollar or other balances to try to cause financial havoc. I think there is a very clear distinction and it would make it tidier for me to try to get the things that we are talking about out of the Trading With the Enemy Act and into a piece of legislation designed to cope with it.

Mr. BEDELL. I understand, but I assume you would have somewhat less concern over the rest of the act if you knew it was applicable only at times we were at war. Am I correct in assuming that?

Mr. STANLEY. Yes.

Mr. STEINBERG. Yes.

Mr. BEDELL. Mr. Cavanaugh, do you have any questions?

INTERNATIONAL ECONOMIC POLICY ASSOCIATION

Mr. CAVANAUGH. I would like to know a little bit about your organization, the International Economic Policy Association.

Mr. STANLEY. Well, it is a nonprofit research group, and it is celebrating its 20th anniversary next week so it has been around for a while. It is supported by a select group of American companies. It does not have any foreign membership. We work on trade, investment, tax, financial problems and, as the title implies, our focus is what kind of an international economic policy the United States should have in today's world. We define our objective or our mission very broadly as advocating policies by governments and businesses which will keep American trade and investment abroad in a state of good health and repute. I guess to the extent one has fallen short of either of those, we have a lot of work to do in the next 20 years.

Mr. CAVANAUGH. Do you make policy recommendations to other governments as well as to our own?

Mr. STANLEY. Not formally but we do certainly have many contacts. We do regular annual surveys in Western Europe and have a lot of contact with their finance and economic ministry people. I don't suppose we have formally proposed things to them but we do try to maintain an intellectual dialog on the problems.

Mr. CAVANAUGH. With reference to our own Government your contacts are primarily legislative?

Mr. STANLEY. No. We publish a series of books, for example, on the balance of payments, or natural resources. We work mostly in the area of broad research and education. We do give advice when asked for it by the people in the executive branch. We don't testify very frequently here, and when we do it is usually by invitation as in this case.

Mr. CAVANAUGH. Could you give me some idea of the scope or size of the group?

Mr. STANLEY. About two dozen companies or members.

Mr. CAVANAUGH. What is the size of your staff?

Mr. STANLEY. There are about 10 people full time, including administrative, and perhaps another half dozen consultants called on when needed.

Mr. CAVANAUGH. I don't have any questions on the testimony itself.

Mr. STEINBERG. Mr. Chairman.

Mr. BEDELL. Yes.

Mr. STEINBERG. Congressman Bingham asked me in the course of the hearing whether I had any comments on Mr. Stanley's suggestions on pages 11 and 12 of his statement. I would just like to say very briefly, if I may, that essentially I would agree with most, if not all, of what he suggests. I would like to comment on two or three of these points to give you more of the flavor of my thinking.

For example, and I am not really holding Mr. Stanley to the specifics of these word by word; he may even agree with some of the things I am going to say.

EXECUTIVE EXPLANATION OF EMERGENCY IS NECESSARY

In item No. 2 on his page 11 where he says that actions regarding these categories could go into effect on Presidential certification in each case that an emergency exists, I think what we need is more than a Presidential certification in simple form—in simple terms that an emergency exists. For example, I would not like to see this kind of action taken upon simple certification by a President that "a national emergency exists." I think he should explain to the country what the emergency is. There have been too many instances, I think, where the word "emergency" has been used as justification for Presidential action, and the situation was what many would regard as somewhat less than an emergency requiring extraordinary measures.

I would also say that Mr. Stanley may have a point in his No. 3 where he says that affirmative confirming action by the Congress should not be required. At this point I am not really ready to say whether it should or should not be. I think there is some merit to his suggestion that affirmative congressional action should not be required. Certainly provision for veto of Presidential action by concurrent resolution, assuming that is constitutional, I think is a good idea and may be the best way to handle it. I have to give that further thought.

TIME LIMIT TO DECLARED EMERGENCY

On item No. 8 where he says that the President should be required to state a date certain for expiration of measures imposed, unless explicitly renewed, such a date he says should not be more than 2 years in

the future. In his testimony he said that is an arbitrary figure; it could be 1 year, it could be 3 years. I would agree fully when he says that anything that is to last longer than 2 years would improperly be regarded as an emergency situation. I think the best figure to use is 1 year subject to explicit renewal.

I would add to that my feeling, even within that 1 year if that is the time frame, that the President be required in some reasonable way to keep the Congress informed on the need for the trade embargo or whatever control we are talking about, the cost effectiveness of that kind of measure, and in general whether that measure is continuing to serve the overall public interest. Because when you impose an extraordinary measure of control over the international economic transactions of the country, in trade or in other fields, you are imposing a very serious burden on the business community, on those who are engaged in these transactions. I think that in all fairness to everybody and in fairness to our overall national interest, not just the needs of the private sector, that the President ought to keep the Congress informed in some way, maybe every 6 months for as long as the control is exercised, on the effectiveness of this extraordinary measure, why it is needed and how it serves the overall public interest.

Those I think would be the more detailed comments that I would add at this time to a very constructive, I think, array of proposals that Mr. Stanley has proposed.

DEFINITION OF NATIONAL EMERGENCY

Mr. BEDELL. Do I understand you to say that in your opinion either import controls or export controls should not be imposed unless it is agreed that a state of emergency exists, and do you mean by that an emergency in regard to that particular matter or do you mean a general national emergency? Do I understand you correctly?

Mr. STEINBERG. That is a good question. Here again we need a better definition of what we mean by emergency. For example, there are various forms of import control, as I am sure you are aware, that do not in any way involve a national emergency.

Mr. BEDELL. Do I understand that without this act——

Mr. STEINBERG. No, the President still has the authority under the Trade Act to resort to import controls where there has been a finding of serious injury.

Mr. BEDELL. So he does not need this for that.

Mr. STEINBERG. No, he does not need this for that. Where we are talking about the national security, let's say.

Mr. BEDELL. Talking about something else. That is all I hear and I am not sure what that means.

Mr. STEINBERG. In my statement I refer to the national security clause of the Trade Act, a provision which has been in legislation for approximately 20 years, which provides that where imports are found to impair the national security, and there is some explanation in the act as to what we mean by national security, the President must—must—adjust the imports and that is the only thing the Congress requires the President to do where there is a finding of impairment of the mobilization base. In my judgment you have here a serious lack of congressional concern with the real problems, the real weaknesses of

that sector of the mobilization base, and lack of congressional oversight on how best to solve that particular problem.

Now to be more precise, there has been one instance in which imports have been controlled for national security purposes and that is petroleum. I don't want to go through the whole history of that except to make this one point. The President of the United States imposed import quotas on petroleum in 1959 after a finding of impairment of national security. These controls were not imposed in the context of a coherent petroleum policy or a coherent energy policy.

There was sporadic congressional interest in the subject over the years. There was no systematic congressional review of the need for such controls, how best they serve the national interest and the national security interest. If there had been systematic congressional oversight, we may have avoided—we would have at least greatly alleviated, in my view—the present energy crisis because there would have been close congressional scrutiny over the weaknesses of our overall energy position. You see, when you resort to trade control and think that you are solving the problem, what you are really doing is diverting attention from the real needs and the real problems of that sector of our economy.

Therefore, one of the main points I make, to get back to the particular context of this hearing, is the need for adequate accountability of the President to Congress on any measures that are taken of an extraordinary nature, whether they be an embargo or a special emergency control of the capital flow or whatever, and close, systematic congressional scrutiny over the use of such extraordinary measures—not the kind of attention that arises merely from the particular interest of a committee chairman in that particular policy area, but systematic review, maybe even required in legislation—maybe that is the only way to get it done systematically—requiring that every 6 months or whatever there must be a hearing or some medium of congressional review of this extraordinary measure taken by the Executive. Congressman, then we will know what we are doing and why we are doing it and how long it ought to last and what it costs the country, and that would be a very sobering lesson, I think, to any President who will know that if he resorts to such action he is going to be held to account by the Congress of the United States.

Mr. BEDELL. Do you have any disagreement with that, Mr. Stanley?

Mr. STANLEY. No, I think that is correct.

Mr. BEDELL. Mr. Cavanaugh.

EXTRATERRITORIALITY

Mr. CAVANAUGH. Mr. Stanley, I would like to hear your comment on section 7 which would exempt foreign subsidiaries. Given the extremely high degree of integration that multinationals have now achieved, wouldn't that be a loophole of tremendous proportions, and how can you deal with it? It seems to me that we cannot just simply exempt all foreign subsidiaries.

Mr. STANLEY. I recognize that it would vary from case to case as to how serious the potential erosion of the control was, and it would be very hard to generalize, but I do think we have seen the kinds of problems that we have had with France, with Canada, with Argentina,

with Brazil and so forth in our various efforts to apply the various embargos. I would like to see a principle that we try to avoid that, except where it is judged necessary to prevent the erosion of the control and in those limited cases, again to try to limit the exception and also to call on the President for consultation with the other governments.

I think, after all, we can control the movements of goods, services and money from our own borders, and these really are the essence of the international corporation. We can say that the parts, the components, the capital goods shall not go if the product, that is the end product, is to be transferred in certain ways.

However, what we have tried to do is to use the fact that there is a U.S. national who may live in Sweden and be employed by a Swedish corporation, to try to control the policy of that Swedish corporation. That, to me, really extends our jurisdiction squarely into somebody else's and is probably, in my judgment, going to cause more problems for the world than it is going to solve. I recognize there will have to be some exceptions; I just would like to make them as stringent as possible.

Mr. CAVANAUGH. Mr. Steinberg, do you have any comment in that regard?

Mr. STEINBERG. No. It is a very serious question, a very important question that you raise but I have no comment at this time.

Mr. CAVANAUGH. I have no other questions.

Mr. BEDELL. Does staff have any questions?

If there are no further questions, the subcommittee will be adjourned until the call of the Chair.

Thank you, gentlemen.

Mr. STEINBERG. Thank you.

Mr. STANLEY. Thank you.

[Whereupon, at 2:20 p.m., the subcommittee adjourned, subject to the call of the Chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

TUESDAY, APRIL 19, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met at 2:20 p.m. in room 2172 Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The Subcommittee on International Economic Policy and Trade will be in order.

Today the subcommittee continues its hearings on "Emergency Controls on International Economic Transactions." The bills before us are H.R. 1560, a bill to repeal section 5(b) of the Trading With the Enemy Act, and H.R. 2382, the Economic War Powers Act.

Before introducing today's witnesses, I would like to make a brief announcement about next week's hearings. On Tuesday, April 26, we will hear from Hon. Julius Katz, Assistant Secretary of State for Economic and Business Affairs, and Hon. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs. The hearing will take place in room 2255 at 2:30 or as soon thereafter as we have completed our business at the full committee.

On Wednesday, April 27, our witnesses will be Mr. Homer Moyer, Acting General Counsel of the Department of Commerce, and Mr. Irving Jaffe, Deputy Assistant Attorney General. This hearing will be in room 2200 at 1:00 or following full committee markup.

It was at the request of the administration that section 5(b) of the Trading With the Enemy Act was exempted from repeal by the National Emergencies Act pending further study, and we are very much looking forward to hearing the results of the administration's study of the issue.

Our witnesses today are Mr. Peter Weiss, vice president of the Center for Constitutional Rights, and Mr. Peter Nelsen, president of the Agricultural Trade Council. I would like to welcome you to the subcommittee and suggest that you both deliver your statements first; after that we will open it up for questions from the subcommittee.

I would particularly like to note the fact that Mr. Weiss is an old friend and neighbor in my home community and I am happy to have both of you here.

Mr. Weiss, would you present your statement, please?

89-711—77——6

STATEMENT OF PETER WEISS, VICE PRESIDENT, CENTER FOR CONSTITUTIONAL RIGHTS, NEW YORK, N.Y.

B.A.—St. John's College, Annapolis, Md., 1949; and LL.B.—Yale Law School, 1952.
Partner: Weiss, Dawid, Fross & Lehrman.
Vice President, Center for Constitutional Rights.
Former Vice Chairman, Industrial Property Commission, International Chamber of Commerce.
Author of articles on legal and political subjects.
Chairman, Board of Trustees, Institute for Policy Studies.

Mr. WEISS. It is a pleasure to appear before this committee and a particular pleasure to appear with you in the chair.

I do not propose to read my entire statement.

Mr. BINGHAM. It will appear in the record in full and we would appreciate it if you would summarize it.[1]

Mr. WEISS. I propose to summarize the first portion, which is largely historical in character, and then read the second and third portions, which are much briefer.

Mr. BINGHAM. Fine.

Mr. WEISS. I appear here for the Center for Constitutional Rights. I am also chairman of the board of trustees of the Institute of Policy Studies, which has been invited to submit its views on repeal of 5(b), and also drawing on my experience as a lawyer advising American multinationals. I might say it is no secret that most of them are not enamored of the embargoes currently in effect under the authority of section 5(b). But clearly I am not here speaking on behalf of any of them.

I take it as more or less common ground, based on the previous work of this committee and of the testimony so far given, that some controls over economic intercourse between the United States and its enemies is necessary; that the Trading With the Enemy Act, however, is a prime example of the unchecked proliferation of Presidential power, that it has been grossly abused since its enactment in 1971, and also that it is highly questionable whether the foreign policy objectives sought to be accomplished by some of the embargoes enacted in the last 30 years under the authority of 5(b) have been wise or have been accomplished.

I thought I would start my preparation for this testimony by taking a quick look at some of the old cases and I must confess I found them fascinating, and they have led me into what may be an overly lengthy discussion of the Trading With the Enemy Act concept as interpreted particularly by the Supreme Court in its first 200 years.

MAXIMALIST APPROACH TO TRADING WITH THE ENEMY

The interesting thing about this is that the judicial decisions show a wild swing of the pendulum. If we look at the first set of cases dealing with the Trading With the Enemy Act, that is, the cases arising out of the War of 1812, we find uniformly a rather absolute, or what we might call maximalist, approach to the subject of trading with the enemy.

[1] Mr. Weiss' prepared statement appears on p. 83.

One of the opinions I cite in my paper is a rather well-known one by Justice Story—this is on page 7 of my paper—in the case of *The Julia*, where he begins by saying that the traditional commentators up to that point had laid down the rule in somewhat restricted terms as confined to commercial intercourse. That is, it was only commercial intercourse that was prohibited in time of war.

He then goes on in a rather lengthy opinion to say that this is too restricted a view, and that a state of war between one nation and another really justifies or mandates the suspension of every kind of intercourse, every kind of relationship. That was pretty much the position of the Supreme Court until the Civil War.

That war gave rise to a whole host of cases in which, as a rule, citizens of rebel States brought actions against citizens of the loyal States. Here we find, rather surprisingly, a complete turnaround.

The leading case from that period is one called *Kershaw* v. *Kelsey*. Although a Massachusetts case, it has frequently been cited with approval by the Supreme Court, mostly because of the extremely learned, even encyclopedic, opinion of Mr. Justice Gray.

Kershaw v. *Kelsey* involved a suit by the owner of a Mississippi plantation against the lessee of that plantation, who was a citizen of Massachusetts, and it was decided for the Mississippian even though the lease was entered into in the middle of the Civil War.

In his opinion, Mr. Justice Gray turned the former doctrine completely on its head. He said, "I have read some dicta in previous cases which say that trading with the enemy prohibits every kind of intercourse. But clearly," he added, "these were only dicta," and he cites just about every major case dealing with that proposition from the previous 75 years, saying that this is obiter dicta, this is mere dicta, this is extrajudicial dictum. What it all comes down to is that "trading with the enemy" means just that, it means "trading." It doesn't mean anything else; it doesn't mean renting land or buying land, it means an ordinary run-of-the-mill commercial transaction and that became the doctrine of the Supreme Court for the next close to a 100 years.

MINIMALIST APPROACH TO TRADING WITH THE ENEMY

My evidence for this is one of the better known cases from the post-World War I period, *Sutherland* v. *Mayer*, where the Supreme Court was dealing with an accounting between German partners and American partners of a partnership dissolved during the war and the decision was, in effect, in favor of the Germans. That is the first case in which one finds a rather clear statement of the rationale of what one might call the more liberal, or minimalist, approach to trading with the enemy.

This is where the Court reviews some of the previous statements of the trading with the enemy rule and then says, "there is no tendency in our day at least to extend these rules to results clearly beyond the need and duration of the need." And, a little later, "The whole tendency of modern law and practice is to soften the ancient severities of war."

So we are left with this rather liberal minimal approach to the trading-with-the-enemy concept until World War II and the cold war. Then not only does the pendulum swing back to the early 19th century

but it goes even further. In the early 19th century the maximalist approach was to prohibit all kinds of intercourse with a real enemy. It never asked the question whether one could prohibit trade with a nonenemy in time of peace for political purposes. But, after World War II, we got to a situation justifying trade embargoes on Cuba, on China, on North Korea 24 years after we stopped being engaged in hostilities with them, and so forth.

FIRST AMENDMENT VIOLATIONS

I cite some of the cases from that period in my paper and I will not rehearse them here, so let me go on then to the second and somewhat unrelated part of my statement entitled "Trading With the Enemy, Due Process and the First Amendment," and I will read now.

Professor Maier, in his March 29 testimony, has ably dealt with some of the constitutional problems inherent in the repeal or revision of section 5(b) of the Trading With the Enemy Act and I fully endorse his call for a well-thought-out congressional policy including reporting requirements and effective limits. I would like, therefore, to deal briefly with an aspect of the Trading With the Enemy Act which, so far as I am aware, has not been touched on by previous witnesses, and which I might say is of particular interest to my organization, the Center for Constitutional Rights. I refer to the potential for constitutionally unacceptable domestic political pressure inherent in a Trading With the Enemy Act, such as the present one, lacking proper safeguards.

I am aware that, in such cases as those mentioned in the recent period portion of my presentation, the courts have upheld the constitutionality, both facial and as applied, of the Trading With the Enemy Act of 1917, against objections of first amendment violations infringing the freedoms of speech, thought and religion. To me, these decisions seem egregiously wrong and I trust that, when the act is rewritten, it will contain no authority for the President to violate the first amendment rights of American citizens under the guise of controlling trade with the enemy.

If the history of the Vietnam war has taught us anything, it is the extreme danger of withholding facts and opinions from the people and then justifying an erroneous policy on the ground that the President knows best. The prohibition on receiving books, films, and newspapers from a country with which we are at war, without any money passing to such country, finds no support whatsoever in the classic doctrine of trading with the enemy.

Nor is it an answer, it seems to me, to say that such imports are permissible under license. Nothing is more odious to the preservation of a free spirit in a people than the licensing of the printed word and other forms of communication. After the revelations of the last few years—the Ervin committee, the Church committee, the Rockefeller Commission—we all know, if we did not know before, what damage can be done to a free society by busy little listmakers with busy little computers shuttling names back and forth from one agency to another. What purpose would have been served by making Walter Teague, one of the plaintiffs in a case called *Teague* v. *Regional Commissioner*, which held that Mr. Teague needed a license to receive newspapers free

of charge from North Vietnam, or the Veterans and Reservists for Peace in Vietnam, a similar case, by making them apply for a license to receive printed material free of charge from Vietnam, except to get their names on such a list?

With respect to the religious argument advanced by Mr. Welch in his case against successive Secretaries of the Treasury and by several of the witnesses representing religious organizations which have appeared before this committee, the case is a little more complicated, but not much more. It is true that the sending of humanitarian aid to an enemy would be considered by some authorities to be forbidden, absent a license. On the other hand, the argument that the giving of such aid is an exercise of deep religious conviction, accompanied by the de minimis character of such aid, seems to me to argue powerfully for exempting humanitarian aid given by bona fide religious organizations from trading-with-the-enemy controls.

There is a further point that has to do with the constitutionality as applied and with the unequal application of the laws. I am using myself as an example here. On a recent trip to Europe, I could not resist the temptation of acquiring a box of genuine Montecristo cigars. Not wishing to aggravate my crime with an element of stealth, I put it in a conspicuous place in my suitcase where the customs inspector would be sure to see it, and he did. Being a fellow connoisseur of the finer things of life, he gave me an appreciative smile and put the contraband back in my suitcase, after receiving my personal assurance that it was entirely for my use.

Two weeks later, an American film maker, returning from assignment in Havana with one of the major networks, was relieved, upon arrival in Miami, of every single item which had been given to him as a gift during his brief stay in Cuba, including a bottle of rum, a box of cigars, assorted records and newspapers, even down to a bar of enemy soap.

Similar examples are legion for travelers returning from North Vietnam during the war. Some have had every last souvenir trinket removed upon returning to the United States, while the possessions of others remained untouched, even though they subsequently learned, thanks to the Freedom of Information Act, that the CIA knew exactly where they had been and when they were returning.

Some of this disparity may be attributable to run-of-the-mill bureaucratic inefficiency. But one does not have to be afflicted by a particularly severe case of paranoia to form the conclusion that much of this discriminatory treatment is motivated by a desire to harass, to frighten and to punish, three purposes which are hardly within the compass of the act under the authority of which the seizures were effected.

SUMMARY

In conclusion, I have tried to show, in the first part of my paper, that "trading with the enemy" was not a concept invented in 1917 to give American Presidents unlimited power to impose restrictions on the foreign and, in some cases, domestic commerce of this country. It is an old, venerable, and, when prudently applied, a necessary institution. It is an attribute of the power to wage war and therefore within the exclusive province of Congress.

In the American practice—this is really the summary of my prepared statement—the concept of trading with the enemy has gone from the early 19th century view proscribing every kind of intercourse with a real enemy to the late 19th century view proscribing only commercial intercourse, strictly defined, with a real enemy, to the late 20th century view proscribing every kind of intercourse with every kind of enemy, real or imagined.

If any usefulness is to be restored to the concept, and if the balance of power between the three branches of Government is to be redressed, there is only one alternative: To act as if words had a meaning and as if ideas had a history.

If this is a correct analysis, the answer to the first three questions put by you, Mr. Chairman, in your statement of March 29 must be in the negative. The Trading With the Enemy Act is not an adequate authority for the imposition of trade embargoes in the time of peace, or for the regulation of private bank lending to the developing nations, or for the exercise of transaction controls on foreign subsidiaries of U.S. companies in furtherance of our foreign policy and national security—except in time of war.

RECOMMENDATIONS

Specifically then, I would offer the following recommendations:

(1) The Trading With the Enemy Act of 1917 should be repealed.

(2) A new law should be passed, defining the President's authority to impose controls on international commerce as restricted to prohibiting such commerce, with exceptions for general or validated licenses, (*a*) with enemy nations in times of declared war and (*b*) with nations declared to be subjects of sanctions or embargoes by international bodies to which the United States is bound by treaty obligations, and (*c*) with all nations, as to the export of certain strategic or scarce goods and materials. And I might add strategic data and technology.

As to imports, an exception would, of course, have to be made for their continuing regulation for tariff purposes and for reasons of public health or public policy.

I appreciate that the proposed scheme, in a sense, begs the principal question before this committee, namely, what are the proper roles of Congress and the President in regulating commerce with foreign nations in times of peace, for political purposes—"to further the foreign policy of the United States," in the words of section 2 of the Export Control Act of 1949?

My answer would be: None, in the absence of internationally declared sanctions or embargoes.

Such controls have not worked. They place American business at a great disadvantage in relation to its foreign competitors. They create enormous problems with friendly countries who are hosts to subsidiaries of American based multinationals. They lend themselves to Presidential abuse no matter what the provisions for congressional consultation and periodic review. They may well be in violation of international law—at least as applied to food, medicines, and other necessities of life—and they are inimical to the creation of a just world order, which should be the highest objective of the foreign pol-

icy of the United States and would be the only ultimate guarantee of its national security.

Thank you, Mr. Chairman.

[Mr. Weiss' prepared statement follows:]

PREPARED STATEMENT OF PETER WEISS, VICE PRESIDENT, CENTER FOR CONSTITUTIONAL RIGHTS, NEW YORK, N.Y.

Mr. Chairman and members of the committee: I appreciate the opportunity to appear before this committee and assist it, in some small way, in its current endeavor to pull up section 5(b) of the Trading With the Enemy Act by its roots and determine whether it is worth replanting and, if so, under what conditions.

To the extent that I may have anything useful to say, it will be drawn from both sides of my legal activity. As a private practitioner for over 22 years, I have been engaged in advising American companies, many of them multinationals, on their foreign operations, mainly in the field of industrial and intellectual property and I have served in the past as Vice President of the Intellectual Property Commission of the International Chamber of Commerce.

As a vice president of and volunteer attorney for the Center for Constitutional Rights, I have, during the past decade, engaged in litigation and research concerning the abuse of Presidential power in the foreign affairs arena and concerning the unequal application of the laws for narrowly political purposes.

I am also chairman of the Board of Trustees of the Institute for Policy Studies, which has been invited by this committee to participate in the current hearings.

Having had an opportunity to examine the testimony of the scholarly witnesses who preceded me on March 29, I shall attempt not to duplicate their analyses of the complicated and in many ways surprising history of the Trading With the Enemy Act, and I shall take the following as more or less common ground:

(1) Some controls over economic intercourse between the United States and its "enemies" (more about this term later) are necessary and constitutionally justified.

(2) The Trading With the Enemy Act is a prime example of the unchecked proliferation of Presidential power for purposes totally unforeseen by the creators of that power.

(3) The abuse of the Trading With the Enemy Act by successive Presidents, combined with the unwillingness of the courts and the Congress to correct such abuse, has contributed substantially to the distortion of the balance of powers contemplated in the constitutional scheme.

(4) In addition, some of the uses to which the Trading With the Enemy Act has been put, particularly since World War II, have been highly questionable from a foreign policy viewpoint.

I would like, therefore, to address myself to two points which do not appear to have been covered in previous testimony, i.e., the common law of Trading With the Enemy and its application by the courts, and the civil liberties implications of TWE Controls, whether on a statutory or common law basis.

I. TWE IN THE COURTS: WILD SWINGS OF THE PENDULUM

The Common Law of Trading With the Enemy

I deliberately choose the term "common law" rather than "international law", because I take it on the authority of Lord McNair that it is questionable whether there is any self-executing prohibition against trading with an enemy in the law of nations and, therefore, in the law of "many or most continental European countries".[1] For our present purposes, it is enough to know that, under Anglo-Saxon common law, accepted by British and American courts alike, there is little doubt that intercourse, at least of a commercial nature, with an enemy in time of war is prohibited. Presumably, no modern executive, whether British monarch or American President, would be rash enough to apply the rule ipso facto, without legislative authority, if only because of the manifest uncertainties as to what constitutes "trade", "an enemy", or "war". But it should be noted, at least in passing, that a respectable case can be made for the proposition that trading

[1] McNair and Watts, "The Legal Effects of War," 4th Ed., 1966, p. 344.

with the enemy is inherently forbidden and, a fortiori, may be proscribed by the executive in specific circumstances even without statutory authority.[2]

McNair refers to the rule as one of "respectable antiquity" and traces it back at least to the reign of Edward II in the 14th century.[3] Of the "many sources or explanations of the prohibition * * * put forward from time to time", he mentions the following:[4]

(1) A rather ill defined "general rule" of maritime jurisprudence, as enunciated by Lord Stowell in the leading British case of *The Hoop*, 1 C. Rob. 196, 198 (1799).

(2) The fiction that war between two States makes each citizen of one State the personal enemy of each citizen of the other.

(3) The fact that citizens of the one belligerent lack access to the courts of the other.

(4) The impropriety of allowing "transactions to proceed which are calculated to aid the enemy in the prosecution of hostilities".[5]

(5) The danger of leakage of intelligence attendant upon commercial intercourse with an enemy.

(6) "Public policy."

The specificity of most of these diverse rationales must sound strange to the ears of a member of the post-World War II generation brought up on the nostrum of "national security", which justifies everything while explaining nothing.

Early American Cases

The Revolutionary War and the War of 1812 gave rise to a series of cases in which Trading With the Enemy Law is intermingled with Prize Law which, although frequently related to the former, is considered a branch of maritime law.[6] In fact, the Revolutionary War does not seem to have produced any TWE cases as such. The War of 1812, however, yielded a veritable spate of prize cases, in many of which the principal question before the court was whether the ship seized had served as an instrument for illegal trade with England or its allies. In fact, the better part of the Supreme Court's February term of 1814 seems to have been devoted to such cases.[7]

The general thread running through these cases is one of toughness and absolutism. What is probably the most famous case of the period, *The Ralph*, 8 Cranch 155, involved a United States citizen named Jabez Harrison who, prior to the declaration of the War of 1812, had bought and paid for certain goods in England and stored them on a small, British-controlled island near Nova Scotia. In 1812, after the outbreak of the War, he chartered a boat in Boston to fetch his goods. On the return voyage, the ship and its cargo were seized by a privateer. The unfortunate Mr. Harrison sued to recover his property on the ground that, the commercial transaction having been completed before the outbreak of war, the privateer was not entitled to keep it as a prize. In dismissing his claim, the court stated the rule in its most absolute terms:

> In the state of war, nation is known to nation, only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.[8]

While expressing sympathy for the plaintiff's predicament, and recognizing the fact that no benefit accrued to England from the removal, from English territory, of the previously purchased goods, the court said, in effect, that any kind of dealing with an enemy in time of war was prohibited:

> On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the

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[2] "The rule interdicting trading with the enemy during the existence of a state of war, or after the declaration of the war, exists independently of any statute or proclamation forbidding trading with the enemy". 78 Am Jur 2d 81, cf. cases cited at footnotes 58, 59, 60 and 68.

[3] Op. cit. p. 343.

[4] Op. cit. pp. 344–346.

[5] Lord Macmillan, in *Schering Ltd.* v. *Stockholm Enskilda Bank Aktiebolag*, 1 A.C. 219, 253 (1946).

[6] See, for instance, *Hannay* v. *Eve*, 3 Cr. 242 (1806), in which Chief Justice Marshall struck down as fraudulent an agreement between the crew and passengers of a ship sailing from Kingston to New York and forced to put into port in North Carolina, to take the passengers prisoner and seize the cargo, with the crew acting surreptitiously as trustees for the passengers.

[7] Inter alia, *The Rapid*, 8 Cr. 155, *The Julia*, 8 Cr. 181, *Brown* v. *The United States*, 8 Cr. 110, *The St. Lawrence*, 8 Cr. 434, *The Hiram*, 8 Cr. 444, *The Joseph*, 8 Cr. 451.

[8] 8 Cr. 155, 161.

demoralizing effects that would result from the admission of individual intercourse.[9]

Similarly, in *"The Joseph,"* 8 Cranch 451, The Supreme Court held that the ship had been properly condemned as a prize, even though seized, empty of cargo, on the return voyage from St. Petersburg, because, on the first leg of that return voyage, it had delivered goods from St. Petersburg to London. And in *"The Julia,"* 8 Cranch 181, the Court had gone one step further, upholding the seizure, also on its return voyage, of a ship which had delivered cargo from Baltimore to Lisbon under letters of protection issued by a British consul.

In the latter case, Justice Story, citing his own opinion below in the Circuit Court for Massachussetts, undertook to examine whether the rule against trading with the enemy was limited to commercial dealings or extended to every kind of intercourse. "I am aware", he said at p. 193, "that the proposition is usually laid down in more restricted terms by elementary writers, and is confined to commercial intercourse. Bynkershoek says, *'Ex natura belli, commercia inter hostes cessare, non est dubitandum'* ".

"And yet", Justice Story goes on to say, "it seems not difficult to perceive that his reasoning extends to every species of intercourse". After citing Valin and The Black Book of the Admiralty as authority for this absolutist interpretation of the rule, he goes on to conclude:

"But, independent of all authority, it would seem a necessary result of a state of war to suspend all negotiations and intercourse between the subjects of the belligerent nations. By the war every subject is placed in hostility to the adverse party. He is bound by every effort of his own to assist his own government, and to counteract the measures of its enemy. Every aid, therefore, by personal communication, or by other intercourse, which shall take off the pressure of the war, or foster the resources, or increase the comforts of the public enemy, is strictly inhibited".

The Civil War Cases

As was to be expected, the Civil War gave rise to a series of lawsuits in which plaintiffs sought to hold defendants to their bargains and defendants claimed that a bargain with an enemy, whether entered into before or after the outbreak of hostilities, is not enforceable. Mississippi cotton farmers sought to collect rents from Massachusetts tenants.[10] Louisiana businessmen sought to enforce agreements with their New York partners.[11]

Whether because of the special nature of this particular war, or the attenuating effects of the passage of time upon the absolutist rule of old, the post-Civil War cases show a quality of mercy and reasonableness markedly at variance with the harsh rule of *"The Rapid,"* and *"The Julia."*

Although a number of these cases found their way onto the Supreme Court's docket,[12] what may be the leading case of the period is *Kershaw* v. *Kelsey*, 100 Mass. 561, decided by the Circuit Court for Massachusetts in 1868. This is so because it contains an encyclopedic analysis of the law of trading with the enemy by Justice Gray, as a result of which his opinion has repeatedly been cited with approval by the Supreme Court.[13]

The facts of the case were as follows: In 1864, during the Civil War, Kelsey, a citizen of Massachusetts, leased a plantation in Mississippi from Kershaw, a citizen of that state. The rent was to be paid partly in cash and partly out of the proceeds of the cotton to be grown upon the land. Kelsey was also to pay Kershaw for the corn found on the land at the time the lease was entered into. Kelsey made the required down payment on the rent, but did not pay Kershaw either for the corn delivered to him when he took possession of the land or for the cotton subsequently grown and delivered to him.

Kershaw sued for the unpaid portion of the rent and the value of the corn. Kelsey defended on the ground that the lease, having been made during the war, was null and void under international law, the Act of Congress of 1861 and the Presidential proclamation made thereunder, declaring "all commercial intercourse" between the rebel states and the loyal states to be unlawful.

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[9] Id., 161.
[10] *Kershaw* v. *Kelsey*, 100 Mass. 561.
[11] *Matthew* v. *McStea*, 91 U.S. 7 (1875).
[12] Inter alia, *Hanger* v. *Abbott*, 73 U.S. 532 (1868). *Coppell* v. *Hall*, 74 U.S. 542 (1868), *McKee* v. *U.S.*, 75 U.S. 163 (1868), *U.S.* v. *Lane*, 75 U.S. 185 (1868), *Montgomery* v. *U.S.*, 82 U.S. 395 (1872), *Mitchell* v. *U.S.*, 88 U.S. 350 (1874).
[13] *Briggs* v. *U.S.*, 143 U.S. 346, 353, *Williams* v. *Paine*, 169 U.S. 55, 72, *Birge-Forbes Co.* v. *Heye*, 251 U.S. 317, 323, *Sutherland* v. *Mayer*, 271 U.S. 272, 288.

Both the District and Circuit Courts found the contract to be legal and upheld Kershaw's claim.

How was such a surprising result reached, in view of the categorical approach characterizing the earlier trading with the enemy decisions? It was done, in effect, by pursuing an intellectual course exactly the opposite of that charted by Mr. Justice Story in "*The Julia.*" There, as we have seen, Story took the case law and the commentators as authority for the proposition that, although the rule is sometimes described as forbidding commercial transactions only, it does, in fact, proscribe every kind of intercourse between citizens of enemy nations. Here, Mr. Justice Gray begins his analysis with the statement that "some dicta of eminent judges and learned commentators would extend [the] prohibition to all contracts whatsoever" [14] and, 14 pages later, arrives at the conclusion that, "in accordance with what we have seen to be the general law of nations", it is "commercial intercourse, and commercial intercourse only",[15] which was prohibited by the Act of Congress and the Presidential proclamations cited by Kelsey in his defense. But a lease of land is not commercial intercourse, so Kelsey the loyalist has to pay Kershaw the rebel his money.

In reducing the maximalist to the minimalist position, Gray cuts a wide swath, mowing down British law lords, U.S. Supreme Court justices and continental commentators with admirable impartiality.

The pronouncements by Mr. Justice Johnson in "*the Rapid*" and Mr. Justice Story in "*The Julia?*" Mere "orbiter dicta [16]" (as indeed they were).

The "general statements" of Mr. Justice Daniel in *Jecker* v. *Montgomery* and Mr. Justice Clifford in *Hanger* v. *Abbott?* "Manifestly but repetitions of earlier dicta".[17]

The Black Book of the Admiralty? "A monument of antiquity".[18]

Lord Erskine's statement in "Ex parte Boussmaker" that a debt arising from a contract with an alien enemy could not possibly stand? Another "wholly extrajudicial" dictum.[19]

Chancellor Kent's assertion that the continental writers "unitedly prove that all private communication and commerce with an enemy in time of war are unlawful"? Not supported by a close reading of Grotius, Cleirac and Valin.[20]

Toward the end of his precedent-shattering opinion—from which incidentally, there was no dissent—Mr. Justice Gray purports to show that, in any case, there was never any prohibition in Anglo-Saxon jurisprudence against aliens, even enemy aliens, buying or renting land. And so, having demonstrated that the precedents, properly interpreted, justify his holding, he leaves us with a rather momentous dictum of his own, i.e. that the rule against trading with the enemy should be narrowly interpreted to apply to strictly commercial transactions.

World War I

It remained for a case arising from World War I to furnish a policy rationale for the transition from the maximalist position of the period following the War of 1812 to the minimalist one which came to dominate American jurisprudence during Reconstruction, and which was still adhered to in the period between the two world wars, after the enactment of the Trading With the Enemy Act of 1917.

In *Sutherland* v. *Mayer*, 271 U.S. 272 (1925), the question before the Supreme Court was whether an accounting pursuant to the dissolution of partnership between German and American citizens should be governed by the rate of exchange between the dollar and the mark prevailing on April 6, 1917, the date on which the United States entered the war, or that prevailing when the accounting became possible after the termination of the war.

In justifying a holding which favored the German defendants, the court reviewed some of the classic statements of the rule against trading with the enemy and then added, just before citing *Kershaw* v. *Kelsey*:

"But war is abnormal and exceptional; and while the supreme necessities which it imposes require that, in many respects, the rules which govern the relations of the respective citizens of the belligerent powers in time of peace must

[14] 100 Mass. 561, 563.
[15] Id., 577.
[16] Id., 566, 567.
[17] Id., 568.
[18] Id., 569.
[19] Id., 571.
[20] Id., 571.

be modified or entirely put aside, there is no tendency *in our day at least* to extend them to result clearly beyond the need and the duration of the need.

"*The whole tendency of modern law and practice is to soften the 'ancient severities of war'*, and to recognize, increasingly, that the normal interrelations of the citizens of the respective belligerents are not to be interfered with when such interference is unnecessary to the successful prosecution of the war." [21]

The Recent Period

It remained for the Cold War climate of the period following World War II to revive the absolutist approach of the early 19th century. By this time, the Trading With the Enemy Act and the various regulations enacted under its umbrella had become a sacrosanct body of law, leading the courts to hold that, the First Amendment notwithstanding, U.S. citizens needed a license to receive gratuitous publications from North Vietnam [22] films from Cuba [23], and that a U.S. Quaker could not transmit $25 to the Canadian Friends Service Committee to be used for humanitarian aid to Vietnam.[24]

One can only wonder how these three cases would have been decided under the rule of *Kershaw* v. *Kelsey* that "commercial intercourse, and commercial intercourse only, should be prohibited", or under the principle of *Southerland* v. *Mayer* that "the whole tendency of modern law and practice is to soften 'the ancient severities of war' ".

It also goes without saying that the imposition of an embargo on trade with Cuba in the total absense of a state of war between that country and the United States, and the maintenance of an embargo on trade with North Korea and Vietnam, twenty-four and four years, respectively, after the cessation of hostilities between those countries and the United States, are totally at variance with the common law of trading with the enemy, as well as the pre-World War II jurisprudence of American courts.

Furthermore, the administration of these embargoes employs guidelines which find no support whatsoever in traditional trading-with-the-enemy principles or practice. Thus, on November 17, 1975, the Department of State submitted a statement to this Subcommittee on its policy on the licensing of assistance to Vietnam which indicated that—

(*a*) Its recent decision to reverse the denial of a license to the American Friends Service Committee to export fishnets, rototillers and screwmaking machines to North Vietnam was based, in part, on the release, by the Vietnamese, of nine Americans captured during the spring offensive of 1975; and

(*b*) Its future licensing policy would take into account, inter alia, "the attitude and actions of the Vietnamese towards us *and towards their neighbors*".[25]

This may be flexible diplomacy in the style of an imperial Presidency, but to the extent that it is based ultimately on the Trading With the Enemy Act, it surely represents a thorough perversion of the original purpose of the Act and the higher law which serves as its justification.

II. TWE, Due Process and the First Amendment

Professor Maier, in his March 29 testimony, has ably dealt with some of the constitutional problems inherent in the repeal or revision of Sec. 5(b) of the Trading With the Enemy Act and I fully endorse his call for "a well thought out Congressional policy including reporting requirements and effective limits". I would like, therefore, to deal briefly with an aspect of TWE practice which, so far as I am aware, has not been touched on by previous witnesses. I refer to the potential for constitutionally unacceptable domestic political pressure inherent in a TWE Act, such as the present one, lacking proper safeguards.

I am aware that, in such cases as those mentioned in the "Recent Period" portion of my presentaton, the courts have upheld the constitutionality, both facial and as applied, of the Trading With the Enemy Act of 1917, against objections of First Amendment violations infringing the freedoms of speech, thought and

[21] 271 U.S. 272, 287–288 (emphasis supplied).
[22] *Teague* v. *Regional Commission*, 404 F. 2d 441 (CA2 1968), *Veterans and Reservists for Peace in Vietnam* v. *Regional Commissioner*, 459 F. 2d 676 (CA3 1972).
[23] *American Documentary Films* v. *Secretary of the Treasury*, 344 Fed. Supp. 703 (D.C.N.Y. 1972).
[24] *Welch* v. *Kennedy*, 319 Fed. Supp. 945 (D.C.D.C. 1970).
[25] U.S. Trade Embargo of Vietnam, Hearing before the Subcommittee on International Trade and Commerce, November 17, 1975, p. 12 (emphasis supplied).

religion. To me, these decisions seem egregiously wrong and I trust that, when the Act is rewritten, It will contain no authority for the President to violate the First Amendment rights of American citizens under the guise of controlling trade with the enemy.

If the history of the Vietnam War has taught us anything, it is the extreme danger of withholding facts and opinions from the people and then justifying an erroneous policy on the ground that "the President knows best". The prohibition on receiving books, films and newspapers from a country with which we are at war, without any money passing to such country, finds no support whatsoever in the classic doctrine of trading with the enemy.

Nor is it an answer to say that such imports are permissible under license. Nothing is more odious to the preservation of a free spirit in a people than the licensing of the printed word and other forms of communication. After the revelations of the last few years—the Ervin Committee, the Church Committee, the Rockefeller Commission—we all know, if we did not know before, what damage can be done to a free society by busy little list-makers with busy little computers shuttling names back and forth from one agency to another. What purpose would have been served by making Walter Teague, or the Veterans and Reservists for Peace in Vietnam apply for a license to receive printed material free-of-charge from Vietnam, except to get their names on such a list.[26]

With respect to the religious argument advanced by Mr. Welch in his case against successive Secretaries of the Treasury and by several of the witnesses representing religious organizations which have appeared before this Committee, the case is a little more complicated, but not much more. It is true that the sending of humanitarian aid to an enemy would be considered by some authorities—though surely not Mr. Justice Gray!—to be forbidden, absent a license. On the other hand, the argument that the giving of such aid is an exercise of deep religious conviction, accompanied by the de minimis character of such aid, seems to be to argue powerfully for exempting humanitarian aid given by bona fide religious organizations from trading with the enemy controls.

There is a further point. Every piece of legislation calling for administration by some part of the bureaucracy carries with it the risk of arbitrary and discriminatory implementation. But this risk is particularly great where the legislation is political in character, in the sense of pursuing certain foreign policy objectives, and where U.S. citizens dissenting from those objectives may become favorite targets of the bureaucrats in charge of implementation.

For example, on a recent trip to Europe, I could not resist the temptation of acquiring a box of genuine Montecristo cigars. Not wishing to aggravate my crime with an element of stealth, I put it in a conspicuous place in my suitcase, where the customs inspector would be sure to see it. He did, and, being a fellow connoisseur of the finer things of life, gave me an appreciative smile and put the contraband back in my suitcase, after receiving my assurance that it was entirely for personal use and that I wouldn't part with it for a million dollars. Two weeks later, and American film maker, returning from assignment in Havana with one of the major networks, was relieved, upon arrival in Miami, of every single item which had been given to him as a gift during his brief stay in Cuba, including a bottle of rum, a box of cigars, assorted records and newspapers, even down to a bar of enemy soap!

Similar examples are legion for travelers returning from North Vietnam during the war. Some have had every last souvenir trinket removed upon returning to the United States, while the possessions of others remained untouched, even though they subsequently learned, thanks to the Freedom of Information Act, that the CIA knew exactly where they had been and when they were returning.

Some of this disparity may be attributable to run-of-the-mill bureaucratic inefficiency. But one does not have to be afflicted by a particularly severe case of paranoia to form the conclusion that much of this discriminatory treatment is motivated by a desire to harass, to frighten and to punish, three purposes which are hardly within the compass of the Act under the authority of which the seizures were effected.

III. CONCLUSION AND RECOMMENDATIONS

I have tried to show, in the first part of this paper, that "trading with the enemy" was not a concept invented in 1917 to give American Presidents unlimited power to impose restrictions on the foreign and, in some cases, domestic

[26] Cf. fn. 22, supra.

commerce of this country. It is an old, venerable, and, when prudently applied, a necessary institution. It is an attribute of the power to wage war and therefore within the exclusive province of Congress.

In the American practice, the concept of trading with the enemy has gone from the early nineteenth century view proscribing every kind of intercourse with a real enemy to the late nineteenth century view proscribing only commercial intercourse, strictly defined, with a real enemy, to the late twentieth century view proscribing every kind of intercourse with every kind of enemy, real or imagined.

If any usefulness is to be restored to the concept, and if the balance of power between the three branches of government is to be redressed, there is only one alternative: to act as if words had a meaning and as if ideas had a history.

If this is a correct analysis, the answer to the first three questions put by your Chairman in his statement of March 29 must be in the negative. The Trading With the Enemy Act is not an adequate authority for the imposition of trade embargoes in time of peace, or for the regulation of private bank lending to the developing nations, or for the exercise of transaction controls on foreign subsidiaries of U.S. companies in furtherance of our foreign policy and national security (except in time of war).

Specifically, I would offer the following recommendations:

The Trading With the Enemy Act of 1917 should be repealed.

A new law should be passed, defining the President's authority to impose controls on international commerce as restricted to prohibiting such commerce, with exceptions for general or validated licenses, (*a*) with enemy nations in times of declared war, (*b*) with nations declared to be subjects of sanctions or embargoes by international bodies to which the United States is bound by treaty obligations, and (*c*) with all nations, as to the export of certain strategic or scarce goods and materials.

As to imports, an exception would, of course, have to be made for their continuing regulation for tariff purposes and for reasons of public health or public policy.

I appreciate that the proposed scheme, in a sense, begs the principal question before this committee, i.e., what are the proper roles of Congress and the President in regulating commerce with foreign nations in times of peace, for political purposes ("to further the foreign policy of the United States", in the words of section 2 of the Export Control Act of 1949)?

My answer would be: None, in the absence of internationally declared sanctions or embargoes.

Such controls have not worked. They place American business at a great disadvantage in relation to its foreign competitors. They create enormous problems with friendly countries who are hosts to subsidiaries of American-based multinationals.[27] They lend themselves to Presidential abuse no matter what the provisions for congressional consultation and periodic review. They may well be in violation of international law—at least as applied to food, medicines and other necessities of life—and they are inimical to the creation of a just world order, which should be the highest objective of the foreign policy of the United States and would be the only ultimate guarantee of its national security.

Mr. BINGHAM. Thank you very much, Mr. Weiss, for an extremely interesting statement.

Now, before we turn to questions of Mr. Weiss, we will hear from Mr. Peter Nelsen, president of the Agricultural Trade Council. Mr. Nelsen.

STATEMENT OF PETER J. T. NELSEN, PRESIDENT, AGRICULTURAL TRADE COUNCIL, WASHINGTON, D.C.

Mr. NELSEN. Thank you, Mr. Chairman.

I am Peter Nelsen, an economist and chief executive officer of the Agricultural Trade Council (ATC), a nonprofit trade association

[27] Cf. the note on the *Fruehauf* case at 83 Harvard Law Review 579 and the discussions of the effect of U.S. export controls on Canadian subsidiaries of U.S. companies at 14 McGill Law Journal 174 and 16 McGill Law Journal 460.

representing the export interests of agricultural commodity, agribusiness, food and related industries.

These companies, both large and small, export about $23 billion worth of agricultural and more than $7 billion worth of related implements, machinery, products, and services per year, or approximately 20 percent of total U.S. exports. Their ability to operate and compete in a free world market has direct and immediate effects upon U.S. domestic employment and the U.S. balance of trade.

ADVERSE EFFECTS OF TRADE RESTRICTIONS

Restrictions imposed upon their ability to develop their share of the world market to its fullest extent possible result in lower tax yields to the U.S. Government, and a higher share of the cost of running the Government having to come from individual taxpayers.

Another effect of arbitrary trade restrictions is an increased impetus or necessity for companies to establish foreign divisions and subsidiaries in areas where more favorable business laws exist in order to remain competitive—a process which, in some cases, exports jobs and further detracts from the U.S. GNP and revenue.

To summarize, any limits placed on exports reduces U.S. employment and any limits placed upon imports have an inflationary result for U.S. consumers by reducing competition in the marketplace.

The committee is deliberating the repeal of section 5(b) of H.R. 1560 and urge that a bill such as H.R. 2382, the proposed "Economic War Powers Act," be adopted in its place with certain modifications.

Section 5(b) of the Trading With the Enemy Act of 1917 has been used by various Presidents to assume unlimited powers in controlling trade during nonemergency periods, actions which appear to be unconstitutional and contrary to our basic principles of free enterprise—and contrary to the original intent of the bill.

A declared state of emergency has existed for 44 years authorizing the imposition of section 5(b). Most Americans have no idea which emergency we are in and situations such as this "Catch 22" type rule result in a lack of respect by the public for our laws and legislative process.

We presently have trade embargoes against Cuba, Vietnam, North Korea, Rhodesia, and other countries.

If we can export foodstuffs and industrial machinery to Russia, a self-professed adversary of the Untied States, how can we then justify not exporting food and other civilian necessities to Rhodesia and Cambodia if they are willing to pay for our exports in U.S. dollars or to barter trade with us for raw materials or goods which are needed here.

Our experience with Cuba has been that, when the United States cut off trade with Cuba, the Cubans imported their necessities from Canada, Mexico, and European countries, and the only effect of our action was adverse world public relations and a loss to U.S. exporters of a market where we had an overwhelming competitive advantage over our competitors due to the short distance that our exports had to be transported.

ATC proposes that H.R. 2382 be amended so that the President can impose a general embargo only when we are in a state of declared war. If a condition of imminent danger to the internal security of the United States exists, an embargo could be imposed, but such embargo

should be ratified by two-thirds majority of Congress within 30 days, otherwise, it would cease to have effect, and, if adopted, should be reaffirmed every 60 days by Congress, or else expire.

Without the prerogative of manipulating agricultural and other nonstrategic exports, the President and Congress still would have many options to negotiate foreign policy, such as military aid, military sales, foreign aid, loans, and credits.

It is unlikely that many voters intended to give their elected officials in the White House and in Congress a mandate to bargain or legislate their jobs away, or to reduce their companies' ability to compete favorably in the world market.

Each billion dollars worth of exports produces 50,000 to 75,000 jobs and, in these times of high unemployment, increased world trade is our best assurance for stable farm prices, a healthy domestic economy with high employment, growing GNP, and balanced foreign trade.

The GATT negotiations have been going on for years, with very little progress. It is time that we demonstrate that we are really serious about reducing trade barriers instead of taking one step forward and two steps back, as we have been doing lately. The adoption of H.R. 1560 would help show our desire for freer world trade.

As Cordell Hull once said, "Where trade doesn't cross national boundaries, armies will." ATC proposes that free trade can someday enable us to export plowshares everywhere instead of swords.

Thank you.

Mr. BINGHAM. Thank you very much, Mr. Nelsen.

Just a matter of clarification for my benefit, Mr. Nelsen. What do you interpret as included within the term "agribusiness"?

Mr. NELSEN. Agribusiness refers to different things at different times. It can refer to all agricultural exports, in other areas it refers to agriculture related implements, tools, or food products, food and machinery. There is an overlap between the areas under the Agricultural Department's jurisdiction and the Commerce Department's jurisdiction, agribusiness is sort of a catchall that includes the whole yard.

Mr. BINGHAM. No wonder I have been confused by the term.

Mr. Weiss, you might be interested to know that I had precisely the same experience on returning from Cuba 2 months ago and having all the gifts I had been given in Cuba taken away from me at the Miami airport, including cigars, rum, assorted records, and publications. I have succeeded in getting them back since, but processing the whole transaction problably cost the taxpayers a lot of money.

STATUTES PRECEDING TRADING WITH THE ENEMY ACT

I was extremely interested in your historical analysis of trading with the enemy and we are grateful to you for that. I have one general question about it. All the earlier cases, I take it, through the Civil War cases, arose under the common law, and everything I assume since 1917 has been really a matter of statutory interpretation. How are the earlier cases relevant to the legal situation subsequent to the enactment of the Trading With the Enemy Act?

Mr. WEISS. That is not entirely correct. There was an act of 1789 which forbade intercourse with the enemy. I don't exactly know the name of the act.

Then there was an act of Congress and Presidential proclamations at the beginning of the Civil War and they all figure in the post-Civil War cases. So it is a mixed situation of statutory and common law interpretation.

What the judges did in those 19th century cases was to take the language of the statutes and proclamations to the extent they were involved in the cases and interpret them in light of their understanding of common law, something that for some reason courts since 1917 have not done.

There is a real question, at least in my mind, about the authority of Congress to have given as sweeping powers to the President as they did and certainly there is a question about the way in which the President has interpreted the authority given to him by the language of the Trading With the Enemy Act.

I would suggest that the common law principles of trading with the enemy should have guided the courts in the interpretation of statutory language.

CONSTITUTIONAL PROBLEMS

Mr. BINGHAM. Aren't there two questions, (1) how the constitutionality would have gone if it were so interpreted, and (2) apart from the question of constitutionality, what did the Congress intend?

Mr. WEISS. Right; on the constitutionality, there are different areas of constitutionality. There is the non-first-amendment area which deals with the question of the allocation of power between the Congress and the President. There is also the question of whether to the extent that trading with the enemy is an attribute of the war power, whether it should not be limited to times of war, and there is this whole confusion between the nonwar applications of the Trading With the Enemy Act, the controls on exports in times of peace under the Export Control Act and the Export Administration Act, which might also fall under the Trading With the Enemy Act since it is so broad. There is this overlap.

So there are constitutional questions in the area of allocation of powers between the Congress and the President. Then there is the separate constitutional question I dealt with having to do with first amendment questions.

I am sorry, what was the second part?

CONGRESSIONAL INTENT

Mr. BINGHAM. The other question really is, apart from the constitutional question, what is the appropriate interpretation of the act as written? What was the intent of Congress?

Mr. WEISS. I seems to me the intent of Congress, according to all the historians who have examined the passage of the Trading With the Enemy Act, was to get something on the books they thought was needed for a very short time in a particular emergency. There seems to be general agreement that most Members of Congress hadn't read the bill so it is difficult to say what their intent was. Their intent was to give the President limited power in a limited emergency and it has been with us now for 60 years.

Mr. BINGHAM. In your proposal on page 20, No. 2, paragraph (*c*), presumably the control of exports of strategic or scarce goods and materials would be covered by the Export Administration Act itself——

Mr. WEISS. Yes.

Mr. BINGHAM [continuing]. As we now have it reported out of this committee?

Mr. WEISS. Yes; but my intent there, Mr. Chairman, was to suggest, at least for purposes of discussion, the passage of an act which would define in a broad way the President's authority to limit international commerce——

Mr. BINGHAM. I understand.

Mr. WEISS [continuing]. So you would not have a Trading With the Enemy Act which would forbid him to do certain things and then the Export Administration Act which would allow him to do the same things.

Mr. BINGHAM. I am sure you are aware that last October 1 the administration undertook to do everything provided for under the Export Administraion Act within the authority of the Trading With the Enemy Act.

Mr. WEISS. Right, by proclamation.

UNILATERAL AS COMPARED TO MULTILATERAL EMBARGOES

Mr. BINGHAM. Mr. Nelsen, Mr. Weiss distinguishes between embargoes that are imposed unilaterally by the United States and those imposed by international bodies to which the United States is bound by treaty. You make no distinction in your testimony because you mention Rhodesia as a case in point. Don't you think there is a distinction? In one case it is the United States imposing the embargo and the other is a case where the United States is bound by treaty.

Mr. NELSEN. There definitely is. But our actions toward Rhodesia were unilateral and a matter of U.S. policy. We have been importing chromium from Rhodesia—contrary to the international treaty—but we have now stopped.

The point I was trying to make, though, was that if we want to hurt someone via trading, we should stop importing. Take the Middle East, we are not hurting them by not exporting to them. If our aim is to hurt some country, we should stop importing from them. On the other hand, regarding export embargoes, you should realize that there is a higher calling, and is there a right to withhold food from people needing food? It is a moral question to which I can't give you an answer.

Mr. BINGHAM. Thank you.

Mr. Whalen.

"NONWAR" EMERGENCIES

Mr. WHALEN. Thank you, Mr. Chairman.

Mr. Weiss, referring to your recommendations on page 20, as you interpret it, an "Enemy" is one with whom we are at war under the provisions of article 1, section 8 of the Constitution, is that correct?

Mr. WEISS. That is correct.

Mr. WHALEN. What about a situation, such as existed in Vietnam, where we were very much involved in a shooting affair and yet there was no declared war. Is it your opinion that the War Powers Resolution would take care of that in the future?

Mr. WEISS. First, it is my opinion that that is a situation that should never have existed. We should not have been in that war without a declaration. The War Powers Resolution will to some extent take care of it and I thought about whether I ought to include the War Powers Resolution in my definition of the circumstances under which an embargo may be declared. I might have said the situation of declared war, or a war existing under the War Powers Resolution. I didn't say it because, frankly, I don't like the War Powers Resolution and I think, even though we have the War Powers Resolution, I think there is a case to be made for limiting the exercise of total Presidential controls on exports to situations of declared war.

ECONOMIC WARFARE

Mr. WHALEN. Supposing we engage in economic warfare in which, for example, another country expropriates private U.S. property without any repayment. Under your conclusions then, would the President be allowed to block that other nation's assets that are held in our country?

Mr. WEISS. It is interesting that under that famous Massachusetts case, *Kenshaw* v. *Kelsey*, I think Justice Gray would have said, no. He would say trading with the enemy does not extend to the confiscation of enemy property located within the territory of another belligerent prior to the time of the outbreak of war. I can see how it might be necessary as a diplomatic weapon, but I think that the body of law which he cites—and he goes back quite a ways to the early English cases—would probably say, no, you couldn't do it.

CLARIFYING "NATIONAL EMERGENCY"

Mr. WHALEN. You know as you read section 5(b)—and I pointed this out to the other witnesses—it seems to me the law has two separate provisions. One applies during the time of war. I think that is very clear, it is very specific. The other applies during any other period of national emergency declared by the President. That could relate to a domestic emergency, such as I presume was the authority which President Roosevelt used in the thirties.

My question is, then, would this be made simpler simply by deleting that second phrase?

Mr. WEISS. I think a great deal, yes, and it would not necessarily keep the Congress from giving the President authority to act in a real emergency or prevent the Congress from exercising whatever inherent powers it might have. It is a question of whether you give the President that standby authority to begin with, because I think the record of the last 60 years has demonstrated in this case that it has been a very dangerous thing. The fact that you are not giving him standby authority doesn't mean you can't give him authority on very short notice.

Mr. WHALEN. Would the other alternative be to clarify that and make it more specific?

Mr. WEISS. If it could be done. I think all such efforts would be fraught with great danger.

Mr. WHALEN. Thank you, Mr. Chairman.

AGRICULTURAL EXPORTS AFFECTED BY TRADE EMBARGOES

Mr. BINGHAM. Mr. Nelsen, do you have any figures as to the extent of agricultural exports that are affected by embargoes currently in effect?

Mr. NELSEN. No; but I would be glad to get them for you.

Mr. BINGHAM. We would appreciate it if you would try to do that. I think that would be helpful.

[The information follows:]

DOLLAR VALUES OF THE AGRICULTURAL GOODS IMPORTED BY THE NATIONS AGAINST WHOM THE UNITED STATES HAS IMPOSED EMBARGOES

(1975)

Country:	*Imports*
Rhodesia	$31,510,000
Cuba	600,880,000
North Korea	48,210,000
Cambodia	137,140,000
Vietnam	453,260,000
Total	1,271,000,000

These figures represent total agricultural goods imported, including food and animals, crude materials (oilseeds, fibers, etc.), farm machinery, and fertilizer. If one-third to one-half of these imports could have come from the United States, it would have had a significant effect upon the U.S. agriculture industry and employment.

Is it your position that an embargo should never be imposed in a situation short of declared war?

Mr. NELSEN. Yes. Well, at least certainly for foodstuffs and non-strategic materials.

BLOCKING OF ASSETS

Mr. BINGHAM. Now, in your response to Mr. Whalen, Mr. Weiss. I wasn't clear whether you were indicating what you considered the proper interpretation of the earlier court decisions or whether you were giving you own views when you said that you didn't feel that the U.S. Government should be given the authority to block a nation's assets if properties had been expropriated by that country without compensation.

Mr. WEISS. That is the kind of situation I would prefer to see handled by the Congress on an ad hoc basis, simply because, again, in the experience of the last 30 or 40 years, there have been lots of situations of partial expropriation, partial nationalization, and I think it would be very dangerous to give the President standby authority to decide at what point a given act, or series of acts, by a foreign government constitutes "expropriation of American property" and justifies his blocking all assets of the foreign country. It is frequently not that clearcut a situation.

Mr. BINGHAM. Any further questions?

Mr. WHALEN. No, thank you, Mr. Chairman.

Mr. BINGHAM. I want to thank you gentlemen for your testimony.

The subcommittee stands adjourned.

[Whereupon, at 3:08 p.m., the subcommittee was adjourned, subject to the call of the chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

TUESDAY, APRIL 26, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met at 2:45 p.m. in room 225, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The subcommittee will be in order.

This afternoon, in continuation of its hearings entitled "Emergency Controls on International Economic Transactions," on H.R. 1560 and H.R. 2382, the Subcommittee on International Economic Policy and Trade will hear from Hon. Julius L. Katz, Assistant Secretary of State for Economic and Business Affairs, and Hon. C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs.

I would like to welcome you both to the subcommittee and recognize Mr. Katz first.

STATEMENT OF HON. JULIUS L. KATZ, ASSISTANT SECRETARY FOR ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE

Julius L. Katz was sworn in Thursday, September 23, 1976, as Assistant Secretary of State for Economic and Business Affairs.

Mr. Katz has been the senior Deputy Assistant Secretary of State for Economic and Business Affairs since April 1974. From July 1968 until April 1976 he was Deputy Assistant Secretary for International Resources and Food Policy—serving in a dual capacity from 1974–1976.

Mr. Katz began his career with the Department of State in May 1950, holding several positions dealing with United States economic relations with the Soviet Union, Yugoslavia, Poland and other countries of Eastern Europe.

He was designated Deputy Director of the Office of International Trade in November 1963, and was promoted to Director in August 1965. In this capacity, he was primarily concerned with the Kennedy Round of trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), and attended a number of meetings and working parties of the GATT. His responsibilities also included bilateral negotiations and legislative activities in the trade field. In August 1967, Mr. Katz was named Director of the Office of International Commodities.

Secretary Kissinger presented Mr. Katz with the Department's highest award, the Distinguished Honor Award, in March, 1976. He also received the Department's Superior Service Award in 1965.

Mr. Katz was born in New York City, March 9, 1925. He served with the U.S. Army in the European Theater of Operations from 1943 to 1945. He received his Bachelor of Arts degree from the George Washington University.

Mr. Katz is married to the former Charlotte Friedman of Washington, D.C. They have three children: Barbara, Linda and Lawrence.

Mr. KATZ. Thank you, Mr. Chairman.

I appreciate the opportunity to appear before the subcommittee today to testify on H.R. 1560, a bill to repeal section 5(b) of the Trading With the Enemy Act.

The Department of State's witness before the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Operations testified on April 9, 1975, that the Department believed repeal of section 5(b) without enactment of adequate successor legislation to be imprudent. We continue to hold that view.

We recognize that section 5(b) was explicitly exempted from the scope of the National Emergencies Act enacted during the last Congress to permit thorough consideration of the continuing need and justification for such legislation. We hope that our testimony today will help to make clear that there is such a continuing need.

DEFENSE OF SECTION 5(b)

Section 5(b) has played historically and is playing now an important role in meeting U.S. foreign policy objectives. It grants specific authorities to the President for use during time of war or emergency. These authorities have proved to be an important tool in the conduct of our foreign relations.

The statute has not been invoked frequently during the 60 years it has been on the books. But there have been a few situations where its availability for immediate and continuing use has been of great assistance in reducing the adverse effects of crisis on our national interests.

Operating under the authority of section 5(b), successive administrations have devised rapid responses to particular emergency situations. For instance, on a few occasions there was a need to block foreign assets in the United States without delay. The assets involved could have been withdrawn out of the country in the time required for even the most expeditious congressional action.

We believe that Presidents over the years have been circumspect in their invocation of the authority of section 5(b). Indeed, Congress has on several instances subsequently passed legislation which explicitly authorized action in nonemergency situations of the type orginally taken pursuant to section 5(b). We recognize that some measures taken under section 5(b) have remained in effect longer than was originally contemplated. Nevertheless, as our relations with particular countries have evolved, the executive branch has terminated or modified many of these measures. Those controls currently being exercised are reviewed on a continuing basis in the context of our developing relationships with the targeted countries.

Mr. Chairman, I believe that the best way to proceed in our statement is to consider the five pertinent questions contained in your February 15 letter to us.

As we see it, the first question:

> In what specific respects should section 5(b) be repealed as obsolete?

is partially related to the fifth question:

> In what specific respects, if any, should section 5(b) be retained as part of the Trading With the Enemy Act and available only in time of declared war in conformity with the rest of the Act?

We believe that experience during World Wars I and II supports retention of the totality of the authorities conferred on the President by section 5(b) for use in time of war.

We also believe that these authorities continue to be necessary for peacetime emergency situations. Indeed, they are now being used as the basis for current activities. We cannot predict what form of emergency may confront us in the future or what types of emergency action may be required. Therefore, we believe that there are no significant respects in which section 5(b) should be repealed as obsolete.

CURRENT SECTION 5(b) REGULATIONS

The second question was:

What specific activities are currently and potentially conducted by the Department under the authority of section 5(b)?

The Treasury and Commerce Departments, rather than the Department of State, administer the controls currently exercised under the authority of section 5(b). However, the State Department plays a leading role in determining the scope of these controls, because of their significance in our foreign relations.

Treasury Department regulations pursuant to section 5(b) now control imports and financial transactions involving North Korea, Vietnam, Cambodia, and Cuba as well as assets of these countries, of the People's Republic of China, and of various Baltic and Eastern European countries pending resolution of substantial claims of American citizens. Treasury also controls exports from U.S. subsidiaries abroad to Communist destinations. The 1950 to 1971 extensive controls affecting the People's Republic of China were based on section 5(b). In the future it may be in our national interest to take similar action in other areas.

Another current use of section 5(b) is as interim authority for Department of Commerce export controls. It was also used for this purpose on a few other occasions in the past, between periods of validity of the Export Administration Act.

RECASTING 5(b) AS NONEMERGENCY LEGISLATION

The third question was:

In what specific respects should the authority for such activities be recast as standard, nonemergency legislation? Should such authority be written into other laws or as separate legislation? What specific language is recommended?

Some of the situations in which section 5(b) has been invoked could be met through nonemergency legislation. Resort to 5(b) for interim continuation of export controls during lapses of the Export Administration Act would clearly not be necessary if that act were made permanent.

In the absence of section 5(b), I am sure that the Congress would agree that some other means would have to be found to authorize continuation of these controls between periods of validity of the Export Administration Act. Short term extensions of the act might suffice; but making the act permanent legislation would, in our view, be a more appropriate solution.

The controls on exports from U.S. subsidiaries abroad now exercised by the Treasury Department pursuant to section 5(b) could be recast

as an amendment to the Export Administration Act authorizing prohibition or curtailment of exports not only from the United States as is now the case, but also from other countries where such transactions are effectively under the control of persons within the United States.

However, we question both the desirability and practicality of recasting in nonemergency legislation the authority for other measures presently undertaken pursuant to section 5(b), namely Treasury controls on imports, financial transactions and foreign assets. Present arrangements generally work satisfactorily. The courts have developed a substantial body of case law upholding them. Furthermore, there is a substantial legal question as to whether action not related to declared national emergencies or to some other equivalent evidence of overriding national interest would find the same measure of support in the courts. Accordingly, we believe it would be unwise to recast the authority for these activities in standard, nonemergency form.

APPLICATION OF NATIONAL EMERGENCIES ACT GUIDELINES

This leads logically to the fourth question:

In what specific respects, if any, should the authority for such activities be retained as emergency legislation, but amended to meet present circumstances, and to conform to the provisions of the National Emergencies Act? What specific emergency powers should be retained? Under what specific conditions and for what specific purposes should the President be authorized to declare a national emergency for the purpose of activating such powers? Should such authority be retained in the Trading With the Enemy Act, or written into other existing or new legislation?

For the reasons given in responding to the first, second and third questions, we believe that the authorities for activities now contained in section 5(b) should be retained as emergency legislation. The National Emergencies Act includes no substantive powers or authorities to be exercised in the event of a national emergency. Therefore, section 5(b) or a substitute with essentially the same authorities would continue to be needed even if the National Emergencies Act were made applicable to the governing declarations of national emergency.

With respect to conforming to the National Emergencies Act, we would not oppose application of the following sections of that act to emergencies which serve as the basis for the exercise of authorities now contained in section 5(b):

Section 201(a), which authorizes the President to declare national emergencies and states that such proclamation shall immediately be transmitted to the Congress and published in the Federal Register;

Section 201(b)(1), which specifies that provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect only when the President specifically declares a national emergency;

Section 202(a)(2), which provides for the termination of a national emergency by Presidential proclamation;

That portion of section 202(a) which provides that any powers or authorities exercised by reason of an emergency shall cease to be exercised after the date of termination of an emergency specified in a Presidential proclamation except that such termination shall not affect pending actions or proceedings, actions or proceedings based on any

act committed prior to the termination date, or rights or duties that matured or penalties that were incurred prior to such date;

Section 202(d), which provides for termination of any national emergency on its anniversary unless the President publishes in the Federal Register and transmits to the Congress, within the 90-day period prior to each anniversary date, a notice stating that such emergency is to continue in effect;

Section 301, which directs the President to specify the provisions of law under which action is to be taken; and

Section 401, which provides for maintenance of a file and index of Executive orders, proclamations, rules, and regulations issued pursuant to declarations of national emergency or war; transmittal of significant orders of the President and rules and regulations to the Congress; and transmittal of expenditure reports to the Congress.

Our comments on conforming to the remaining sections of the National Emergencies Act are as follows:

Section 101—we believe that the section 5(b) powers and authorities from the existence of declarations of national emergencies now in effect should not be terminated unless or until a satisfactory replacement is in effect.

Section 201(b)(2)—we believe that section 5(b) should not be effective only in accordance with the National Emergencies Act until all of the issues in conforming section 5(b) to this act have been satisfactorily resolved.

Section 202 (a)(1), (b), and (c)—we note the September 14, 1976, statement of President Ford upon signing the National Emergencies Act that the provisions for congressional termination of an emergency by concurrent resolution are unconstitutional.

In summary, the Department of State opposes repeal of section 5(b) of the Trading With the Enemy Act in the absence of replacement legislation containing substantially the same authorities for use in time of war or during any other period of national emergency declared by the President but would not oppose conforming this activity to those portions of the National Emergencies Act dealing with executive procedures.

LEGISLATIVE VETO ON EMBARGOES

The chairman's letter of March 23 to the Department of State also asks for views on H.R. 2382, the Economic War Powers Act. The need for new legislation on embargoes is reduced by the Export Administration Act, which already governs export controls, and emergency legislation such as section 5(b) of the Trading With the Enemy Act, which already governs import controls. The proposal in H.R. 2382 that embargoes could be terminated by concurrent resolution raises a constitutional problem similar to the one I mentioned previously concerning termination of national emergencies by concurrent resolution.

REGULATION OF BANKING TRANSACTIONS

The chairman's March 23 letter also asks whether it would be appropriate for the President to use his asset control powers to regulate banking transactions in furtherance of foreign policy goals of the United States, such as human rights and nonproliferation.

We believe that it would be inadvisable for situations concerning such matters as human rights and nuclear nonproliferation to be regarded as emergencies triggering controls on private banking transactions unless they are part of broader crises directly affecting our primary national interests. Such controls would adversely affect the competitive position of U.S. banks and interfere in their market function, which is important for financing U.S. trade and for the smooth operation of the international financial system. We also believe that it would not be a useful way to implement our policies on human rights and nuclear proliferation.

On the other hand, there is clearly a need for emergency authority to intervene in banking transactions when a given situation does seriously affect the security of the United States. As long as section 5(b) is retained or a substitute is enacted with essentially the same authorities, no further legislation would be required to protect U.S. interests in emergencies.

Thank you, Mr. Chairman.

Mr. BINGHAM. Mr. Bergsten.

STATEMENT OF HON. C. FRED BERGSTEN, ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF THE TREASURY

C. Fred Bergsten, 36, of Annandale, Va., signed the oath of office as Assistant Secretary for International Affairs on March 31, 1977, following confirmation March 29 by the Senate. He was nominated by President Carter on February 7.

Dr. Bergsten graduated magna cum laude in 1961 from Central Methodist College in Missouri. He received M.A., M.A.L.D., and Ph.D. degrees from the Fletcher School of Law and Diplomacy, where he majored in international economics and international relations.

Dr. Bergsten served President Carter as an advisor on international economics during the Presidential campaign, and was in charge of all aspects of international economic policy during the transition period. Shortly after President Carter's inauguration, Dr. Bergsten accompanied Vice President Mondale on his mission to the major European capitals and Tokyo.

As Assistant Secretary for International Affairs, Dr. Bergsten has major responsibilities in the formulation and execution of a wide range of U.S. international economic and financial policies. He has particular responsibility for U.S. participation in the international development lending institutions, including the World Bank. In fulfilling these responsibilities, Dr. Bergsten has recently headed the U.S. delegations to the negotiations for replenishing the resources of the International Development Association, the soft-loan affiliate of the World Bank, and to a meeting of the Group of Ten major industrial nations on international monetary problems.

Dr. Bergsten was a Senior Fellow at the Brookings Institution from 1972 until joining the Carter/Mondale transition team and then the Department of the Treasury. He was a Visiting Fellow at the Council on Foreign Relations during 1971–1972 and 1967–1969; Assistant for International Economic Affairs to the Assistant to the President for National Security Affairs, Dr. Henry A. Kissinger, in 1969–1971; and an International Economist at the Department of State during 1963–1967.

An energetic and prolific writer, Dr. Bergsten is the author or co-author of eight books and more than sixty articles on a wide range of international economic and monetary subjects. His latest volume is "The Dilemmas of the Dollar: The Economics and Politics of U.S. International Monetary Policy," which was published by the Council on Foreign Relations in early 1976. His "American Multinationals and American Interests" will shortly be published by the Brookings Institution. Dr. Bergsten was also the chief author of "The Reform of International Institutions, a study for the Trilateral Commission, an organization

dedicated to bringing about greater cooperation and new initiatives in North America, Europe, and Japan.

Among his many honors, Dr. Bergsten was given a Distinguished Alumnus Award by Central Methodist College in 1975 and was named one of Time Magazine's "200 Young American Leaders" in 1974. While at Brookings, he was a frequent witness before Congressional committees, testifying on such subjects as international monetary reform, overall U.S. foreign economic policy, commodities, trade, and international financial institutions.

Dr. Bergsten was born on April 23, 1941, in Brooklyn, New York. He is married to Virginia Wood Bergsten. They have a son, Mark David, age nine.

Mr. BERGSTEN. Thank you very much, Mr. Chairman.

Let me say that we at the Treasury and the administration as a whole greatly welcome the occasion for review of section 5(b) authorities occasioned by the passage of legislation last year, and in your hearings now.

We have carefully reviewed our approach to the issue as well as the history of the use of 5(b) in coming to the conclusions that we will present to you today. We have concluded on the basis of that review that section 5(b) should be retained. Hence we do oppose H.R. 1560.

However, we do believe there are a number of shortcomings in the present act and we would propose four remedies for those shortcomings:

(1) A remedy that would avoid the use of section 5(b) powers based on outdated and unrelated national emergency proclamations;

(2) A provision of certain limitations on the President's exercise of section 5(b) powers;

(3) Measures to insure the Congress and the public are kept fully informed of the activities carried out under the section; and

(4) Efforts to insure that the section's extra-territorial application is tempered by appropriate foreign relations considerations.

EFFECTS OF REPEAL OF SECTION 5(b)

In my statement I lay out in some detail the current implementation of section 5(b) authorities, and the history of that act. I will be willing to discuss any of this in detail subsequently in the hearings today, but orally I would simply like to turn to pages 8 and 9 of my statement, and summarize what we feel would be the effect of an outright repeal of section 5(b). As my statement explains, we would oppose a step of that type.

Basically, there would be four immediate practical effects of repeal:

(1) The current trade and financial embargoes against Cuba, North Korea, Vietnam, and Cambodia would be terminated unless new enabling legislation to keep them in effect were enacted simultaneously. Such a unilateral termination of the embargoes would severely undermine the U.S. negotiating position with those countries, and our worldwide posture.

(2) The Transactions Control Regulations, which insure that subsidiaries of American companies in other countries do not deliver arms, munitions, or strategic goods to Communist nations except on terms permitted by NATO policies, would also lapse. However, it is true that regulations to effectuate this purpose could be implemented under new permanent legislation.

(3) The current freezing of Chinese, Vietnamese, and Cuban assets would terminate immediately. Loss of control of these assets would

deprive American claimants against these countries of the security afforded for their private claims by this collateral, which is now held against, hopefully, claim settlements with those countries.

(4) The controls over the remaining World War II blocked assets of East Germany, Czechoslovakia, and the Baltic States would also lapse.

CONSTITUTIONALITY OF NONEMERGENCY FREEZING OF ASSETS

While not entirely clear, it appears that an attempt to preserve the blocked status of Chinese, Vietnamese, Cuban, and World War II assets by standard, nonemergency legislation, might founder in the courts on the constitutional grounds that the freezing of such assets required the existence of an "emergency."

Serious legal questions are presented by depriving foreign countries and nationals who are not technically "enemies" of the use of their property for indefinite periods in the absence of emergency authority.

In addition, there is an overriding reason for not recasting section 5(b) as standard legislation. The history of the act strongly suggests the continuing need to place flexible powers of this type at the President's disposal in an emergency situation. Such flexibility, however, which is necessary in such unforeseen and unpredictable situation would, we feel, be inappropriate to standard, nonemergency legislation.

In sum, we believe that section 5(b) should remain an emergency powers provision. Nonetheless, we also believe the 60-year history of the section has revealed the desirability of reforms in the way its nonwartime national emergency powers are exercised.

We fully support the need for such reform. Indeed, the authority of the section is so broad that this administration strongly believes that the powers should only be used on a truly emergency basis. Accordingly, the administration proposes several changes in the way the section is used.

CONTROLS SHOULD BE RELATED TO NATIONAL EMERGENCY

(1) The President should be required, by amendment of section 5(b), to proclaim a new national emergency to deal with any future crisis calling for a new application of section 5(b). This requirement will prevent Presidential reliance on outdated emergencies which do not relate to the current situation.

An instance of such reliance, which section 5(b) presently permits, may be found in the implementation of the foreign direct investment program in 1968. The Executive order imposing this program relied upon the continued existence of the national emergency declared by President Truman in December 1950. The stated purpose of the 1968 program was to control transfers of capital to foreign countries for balance-of-payment reasons. The 1950 emergency declaration related to the hostilities in Korea and the threat of Communist aggression. This divergence between the situation addressed by the 1950 emergency declaration and the purpose of the 1968 program illustrates the kind of situation which could be remedied through the amendment we support. Further, by requiring future Presidents to declare a new national emergency before invoking section 5(b) powers, the amend-

ment would accomplish the important objective of encouraging circumspect use of the section.

CONGRESSIONAL VETO

(2) The President's exercise of section 5(b) powers can be made subject to certain limitations. The legislation which emerges from these hearings will have a restraining influence, not only on this administration, but also on future Presidents.

We have struggled with proposals to accomplish restraint through congressional concurrence in the use of section 5(b). Constitutional considerations compel our objection to the termination of section 5(b) measures by concurrent resolution of Congress. The use of this concurrent resolution mechanism in H.R. 2382, the Economic War Powers Act, is among our principal reasons for objecting to that bill. The administration, instead, proposes that section 5(b) measures automatically expire on the anniversary of the supporting national emergency unless the President publishes in the Federal Register and transmits to the Congress a notice stating that such emergency measures are to continue in effect after such an anniversary.

Congress may, of course, terminate by legislative act any measures adopted under section 5(b). This approach, together with the requirement that a new national emergency be declared whenever a new section 5(b) power is used, will require the President to assess carefully and exercise sparingly any measures taken under section 5(b). Should the President fail to extend those national emergency measures, his powers will expire. We believe this mechanism, which is also found in the National Emergencies Act, will sufficiently inhibit the President's use of section 5(b).

REGULAR PRESIDENTIAL REPORTS TO CONGRESS

(3) In accordance with accountability and reporting requirements contained in the National Emergencies Act, the President could be required to transmit a report to Congress every 6 months on the activities conducted pursuant to section 5(b). Such reporting will keep Congress informed and require the Executive to review regularly its use of section 5(b) powers with the certain knowledge that they will be subject to congressional and public scrutiny. This periodic review will provide the basis for a continuing dialog on the policies and uses of section 5(b) and enable the Congress and the public better to judge their wisdom.

EXTRATERRITORIALITY

(4) Finally, we have reviewed the history of the extraterritorial application of section 5(b), particularly in nonwartime national emergencies. The effectiveness of controls imposed under section 5(b) may depend on extraterritorial applications.

However, we have noted numerous instances in which such extraterritorial application has produced friction in our relations with other countries. There is a question of whether the advantage of more effective leverage vis-a-vis the country that is the object of the con-

trols is outweighed by the disadvantage of an irritant in our relations with many friendly countries affected by extraterritorial applications of U.S. controls.

Accordingly, in the absence of war and armed hostilities, this administration will weigh very carefully the foreign relations costs of extraterritorial extensions of any new measures pursuant to section 5(b).

In sum, Mr. Chairman, we feel that it is essential to retain the basic authority of section 5(b), but we do propose a series of changes which we feel will make it more responsive to public and congressional scrutiny and avoid any further risk of undue and arbitrary exercise of that authority.

Thank you.

[Mr. Bergsten's prepared statement follows:]

PREPARED STATEMENT OF HON. C. FRED BERGSTEN, ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS, DEPARTMENT OF THE TREASURY

Mr. Chairman and members of the Subcommittee on International Economic Policy and Trade, I am pleased to have the opportunity to testify on H.R. 1560, a bill "To repeal Section 5(b) of the Trading with the Enemy Act of 1917."

Congress recognized the importance and complexity of the powers conferred by Section 5(b) when it provided in the National Emergencies Act for the study of that Section. This study has provided a welcome occasion for deliberate evaluation of the policies, programs and procedures which should be pursued under that Section.

The Administration has carefully reviewed the history and uses of the Section as well as the modern needs for Congressionally-delegated Presidential emergency powers. We have concluded that Section 5(b) should be retained. Hence we oppose H.R. 1560. However, we believe past shortcomings can be remedied and we advance proposals to accomplish four purposes:

(1) Avoid the use of Section 5(b) powers based on outdated and unrelated national emergency proclamations;

(2) Provide for certain limitations on the President's exercise of Section 5(b) powers;

(3) Insure that Congress and the public are kept informed of the activities carried out under the section; and

(4) Insure that the section's extraterritorial application is tempered by appropriate foreign relations considerations.

I shall discuss these proposals in detail. But first I would like to describe briefly the reasons why the Administration believes that it is essential for Section 5(b) to be retained.

Since its enactment in 1917, Section 5(b) has evolved through four amendments from a simple trading with the enemy provision to a broad emergency statute. A recitation of all of the uses of Section 5(b) is unnecessary to establish that it has been indispensable in the Presidential response to true emergency situations.

Section 5(b)'s current principal importance to the Treasury Department is to serve as authority for the Foreign Assets Control Program. But it has provided the basis for Presidential responses to a variety of unforeseen emergencies.

As enacted in 1917, section 5(b) authorized the President to investigate, regulate, or prohibit, transactions in foreign exchange; export of gold or silver coin or bullion, or currency; transfers of credit; and transfers of evidence of indebtedness or the ownership of property between persons in the United States and residents of any foreign country. Other sections of the Trading with the Enemy Act defined terms such as "enemy" and "ally of enemy", prohibited trading with either, and provided for an alien property custodian and claims procedures. Many of these basic provisions have remained virtually unchanged. Section 5(b), however, has been amended on four subsequent occasions: in 1918, 1933, 1940 and 1941.

Each of the amendments broadened the substantive powers of the statute, the circumstances under which they could be employed, or both. The most

important amendments were in the Emergency Banking Act of 1933 when the section, previously operative only in wartime, was made effective during any other national emergency declared by the President; and in the First War Powers Act of 1941 where the section was expanded to authorize controls over property of foreign nationals other than "enemy" nationals.

These amendments were passed by the Congress in times of domestic and international crisis. The courts have consistently upheld these Congressional delegations of emergency powers and the Executive's exercise of them as proper and constitutional.

In its present form, section 5(b) authorizes the President to control a broad range of transactions, primarily in the international monetary and trade areas, in time of national emergency, as well as when an actual state of war exists. It has been used in two major areas: (1) monetary crises such as the 1933 Banking Emergency, and (2) situations of international hostilities or tension such as the Korean conflict or the Cuban situation.

The first major peacetime use of section 5(b) powers was during the 1933 Banking Emergency when they were used as a basis for the Bank Holiday proclamations and for the imposition of restrictions on gold ownership by American citizens. Prior to and during World War II, section 5(b) provided the basis for the Treasury Foreign Funds Control Regulations, which restricted alien property. Consumer installment credit controls were introduced pursuant to section 5(b) shortly before World War II as a measure to fight inflation. More recently, the section was relied upon as peacetime authority for the 1968 Foreign Direct Investment Program and the 1971 temporary import surcharge imposed in connection with a balance-of-payments program. On four separate occasions, export controls were implemented under the authority of section 5(b) upon the expiration of the Export Administration Act of 1969. Later in my testimony, I shall return to some of these contemporary uses of section 5(b) in discussing our proposals for change.

Timing has been an important consideration in many of the situations where section 5(b) powers were invoked. In some instances, the speed with which the Executive was able to respond to an emergency under section 5(b) was a distinct advantage in taking effective measures. This speed is particularly necessary where significant advance notice might precipitate a worsening of the emergency which the measures were intended to alleviate.

In 1933, for example, by using section 5(b), the President was able to prevent further bank withdrawals, hoarding of gold, and large international transfers of gold and currency which otherwise might have occurred. When the Nazis occupied Norway and Denmark in 1940, property such as U.S. bank accounts held by persons in those countries, and U.S. securities, was immediately frozen by Executive Order with no transfers permitted without a license. Had this not been done promptly, the property might have been seized by the Reich, liquidated, and the proceeds withdrawn from the United States in a matter of days.

This history demonstrates the desirability of retaining section 5(b) powers on a standby basis. We cannot foresee what emergency situations might require its use in the future, but neither could we have anticipated its past use. Emergencies by their nature are unpredictable and require swift responses. We believe the President should retain the power to provide such responses. Historically, Congress has supported this power, frequently confirming or otherwise approving Presidential actions under section 5(b).

There are some cases where Congress has provided for permanent authority to deal with a situation initially dealt with by the Executive under section 5(b) on an emergency basis. For example, in the Gold Reserve Act of 1934, submitted to Congress by President Roosevelt, the Congress provided permanent authority for the regulation of gold holding and dealing by Americans initially imposed under section 5(b) in 1933. The Emergency Banking Act of 1933 contained a provision, still in effect, which specifically authorizes imposition of an emergency bank moratorium such as imposed under section 5(b) in March 1933. The Foreign Assistance Act of 1961 contains specific Congressional authorization for a trade embargo of Cuba.

Such specific legislative actions, which have often been enacted with the consultation and cooperation of the Executive, have reinforced the effectiveness of emergency action. In your letter to Secretary Blumenthal, Mr. Chairman, you inquired whether section 5(b) might be recast as standard, nonemergency legislation. We feel that it would be legally unsound, as well as unwise from a policy standpoint, to attempt to recast section 5(b) in its entirety as standard,

nonemergency legislation. I will explain why as I discuss the effect of repeal of section 5(b) on Treasury's Foreign Assets Control program.

The Foreign Assets Control program has two aspects: (1) it imposes a near-total restriction on current transactions with certain countries, and (2) it "freezes" or "blocks" the assets of these countries, pending some agreement with the countries involved, and/or Congressional action directing disposition of the property.

Presently, under the Foreign Assets Control Regulations, there is a total embargo, with the exception of travel and certain humanitarian activities, on current transactions with North Korea, Vietnam, and Cambodia. Furthermore, China remains a designated or "blocked" country under the Foreign Assets Control Regulations, but current trade and financial transactions have been permitted with China since May 6, 1971 so long as strategic goods are not involved.

A parallel set of regulations, the Cuban Assets Control Regulations, embargoes all current U.S. transactions with Cuba and blocks Cuban assets under U.S. jurisdiction. While the Foreign Assets Control Regulations do not permit U.S. subsidiaries overseas to trade with blocked countries, such as North Korea, the Cuban Assets Control Regulations permit overseas subsidiaries of U.S. firms to trade with Cuba if they obtain a Treasury license. This provision was instituted for foreign policy reasons since certain countries in which U.S.-owned firms are located insist that such firms be permitted to trade in Cuba.

Although the Office of Foreign Assets Control also administers U.S. implementation of the U.N. embargo against Rhodesia, this embargo is sanctioned under the authority of the United Nations Participation Act, not under section 5(b).

The Transactions Control Regulations promulgated under section 5(b) supplement the Commerce Department's export controls by preventing U.S. persons, except by license, from engaging in transactions in foreign-origin strategic goods located abroad for shipment to Communist countries.

Finally, the Foreign Funds Control Regulations, highly important prior to and during World War II, are now reduced to a residual status. Currently, these regulations apply only to assets blocked during World War II of Czechoslovakia, East Germany, Latvia, Lithuania, and Estonia, or their nationals, pending a claims settlement for illegal expropriations of private U.S. property.

The immediate effect on Treasury's Foreign Assets Control program, particularly on the blocked assets, of outright repeal of section 5(b), can be summarized as follows:

(1) The current trade and financial embargoes against Cuba, North Korea, Vietnam, and Cambodia would be terminated unless new enabling legislation to keep them in effect were enacted simultaneously. Such a unilateral termination of the embargoes would severely undermine the United States' negotiating position with those countries.

(2) The Transactions Control Regulations, which ensure that subsidiaries of American companies in other countries do not deliver arms, munitions, or strategic goods to Communist nations except on terms permitted by NATO policies, would also lapse. However, regulations to effectuate this purpose could be implemented under new permanent legislation.

(3) The freezing of Chinese, Vietnamese, and Cuban assets would terminate immediately. Loss of control of these assets would deprive American claimants against these countries of the security afforded for their private claims by this collateral.

(4) The controls over remaining World War II blocked assets of East Germany, Czechoslovakia, Latvia, Lithuania, and Estonia would also lapse.

While not entirely clear, it appears that an attempt to preserve the blocked status of Chinese, Vietnamese, Cuban and World War II assets by standard, nonemergency legislation, might founder in the courts on the constitutional grounds that the freezing of such assets required the existence of an "emergency". Serious legal questions are presented by depriving foreign countries and nationals who are not technically "enemies" of the use of their property for indefinite periods in the absence of emergency authority. In addition, there is an overriding reason for not recasting section 5(b) as standard legislation. The history of section 5(b) strongly suggests the continuing need to place flexible powers of this type at the President's disposal. However, while the flexibility afforded by section 5(b) is both necessary and desirable in emergency powers, such flexibility would be inappropriate to standard, nonemergency legislation.

In sum, we believe that section 5(b) should remain an emergency powers provision. Nonetheless, we recognize that the sixty-year history of the section has revealed the desirability of reforms in the way its non-wartime national emergency powers are exercised. Indeed, the authority of the section is so broad that this Administration strongly believes that the powers should only be used on a truly emergency basis. Accordingly, the Administration proposes several changes in the way the section is used. These reforms do not address nor are they intended to limit, the President's war powers under section 5(b).

(1) The President should be required, by amendment of section 5(b), to proclaim a new national emergency to deal with any future crisis calling for a new application of section 5(b). This requirement will prevent Presidential reliance on outdated emergencies which do not relate to the current situation. An instance of such reliance, which section 5(b) presently permits, may be found in the implementation of the Foreign Direct Investment Program in 1968. The Executive Order imposing this Program relied upon the continued existence of the national emergency declared by President Truman in December 1950. The stated purpose of the 1968 Program was to control transfers of capital to foreign countries for balance-of-payments reasons. The 1950 emergency declaration related to the hostilities in Korea and the threat of Communist aggression. This divergence between the situation addressed by the 1950 emergency declaration and the purpose of the 1968 Program illustrates the kind of situation which could be remedied through the amendment we support. Further, by requiring future Presidents to declare a new national emergency before invoking section 5(b) powers, the amendment would accomplish the important objective of encouraging circumspect use of the Section.

(2) The President's exercise of section 5(b) powers can be made subject to certain limitations. The legislation which emerges from these hearings will have a restraining influence, not only on this Administration but also on future Presidents. We have struggled with proposals to accomplish restraint through Congressional concurrence in the use of section 5(b). Constitutional considerations compel our objection to the termination of section 5(b) measures by concurrent resolution of Congress. The use of this concurrent resolution mechanism in H.R. 2382, the Ecnomic War Powers Act, is among our principal reasons for objecting to that bill. The Administration instead proposes that section 5(b) measures automatically expire on the anniversary of the supporting national emergency unless the President publishes in the Federal Register and transmits to Congress a notice stating that such emergency measures are to continue in effect after such an anniversary. Congress may, of course, terminate by legislative act any measures adopted under section 5(b). This approach, together with the requirement that a new national emergency be declared whenever a new section 5(b) power is used, will require the President assess carefully and exercise sparingly any measures taken under section 5(b). Should the President fail to extend those national emergency measures, his powers will expire. We believe this mechanism, which is also found in the National Emergencies Act, will sufficiently inhibit the President's use of section 5(b).

(3) In accordance with accountability and reporting requirements contained in the National Emergencies Act, the President could be required to transmit a report to Congress every six months on the activities conducted pursuant to section 5(b). Such reporting will keep Congress informed and require the Executive to review regularly its use of section 5(b) powers with the certain knowledge that they will be subject to Congressional and public scrutiny. This periodic review will provide the basis for a continuing dialogue on the policies and uses of section 5(b) and enable Congress and the public better to judge their wisdom.

(4) We have reviewed the history of the extraterritorial application of section 5(b), particularly in non-wartime national emergencies. The effectiveness of controls imposed under section 5(b) may depend on extraterritorial applications. However, we have noted numerous instances in which such extraterritorial application has produced friction in our relations with other countries. There is a question of whether the advantage of more effective leverage vis-a-vis the country that is the object of the controls is outweighed by the disadvantage of an irritant in our relations with many friendly countries affected by extraterritorial applications of U.S. controls. Accordingly, in the absence of war or armed hostilities, this Administration will weigh very carefully the foreign relations costs of extraterritorial extensions of any new measures pursuant to section 5(b).

Mr. BINGHAM. First, I would like to inquire, do I assume correctly that you are both stating the administration position here?

Mr. KATZ. Yes, sir.

Mr. BINGHAM. In other words, Mr. Katz, the State Department concurs in the specific recommendations contained in Mr. Bergsten's statement?

Mr. KATZ. Yes, sir.

Mr. BERGSTEN. All other agencies. The testimony was cleared through the normal interagency process via OMB.

CURRENT NATIONAL EMERGENCY

Mr. BINGHAM. Mr. Katz, what is the national emergency currently facing us which warrants the use of powers under the Trading With the Enemy Act?

It is made clear in both of your statements that the powers of the act can only be used during a period of national emergency. Let me just read the opening phrase of the Trading With the Enemy Act: "During the time of war, or during any other period of national emergency declared by the President."

What is the national emergency today?

Mr. KATZ. It continues to be the emergency involving the threat of Communist aggression which was declared in 1950 at the time of the aggression in Korea.

Mr. BINGHAM. Are you serious?

Mr. KATZ. That is the national emergency, Mr. Chairman, and it continues.

Mr. BINGHAM. The emergency is the emergency that existed in 1950?

Mr. KATZ. It has not been terminated.

Mr. BINGHAM. I am asking you for the facts. What is the national emergency that the country confronts today?

Mr. KATZ. No President since that time has seen fit to terminate that emergency. I think that some of the precise circumstances have changed, but I think the general situation remains unchanged. The need for controls against North Korea has remained unchanged. Certain of the other controls under that——

Mr. BINGHAM. What is the national emergency that justifies requiring reports from companies receiving requests to comply with the boycott against Israel?

Mr. KATZ. I am not clear, Mr. Chairman, whether that requirement is under that authority. I take it that you are suggesting that it is.

Mr. BINGHAM. You said that everything that was done under the Export Administration Act, which expired on September 30, can be carried out under the Trading With the Enemy Act, and that is the case today. Now, part of that is a requirement of information from companies that are complying and receiving requests with respect to the Arab boycott. I agree with that requirement. But what I am asking you is, what is the national emergency that justifies that action by the Government absent any specific authority to that effect?

Mr. KATZ. I believe that a continuation of the export controls is justified under that emergency. The use, under that emergency authority, of some of the other authorities contained in the Export Administration Act may not seem as appropriate. Therefore, I think that in the future

it would be proper to require a specific declaration of emergency for a specific action.

Mr. BINGHAM. Gentlemen, I think that I have a reputation of being a fairly peaceful Member of the Congress when it comes to administration witnesses. I don't recall in more than 12 years being as totally dismayed by administration response to a congressional request as this testimony.

The net of it is that the administration wants to continue exercising powers which in the mind of any fair-minded observer—and we have had testimony from outstanding lawyers—are totally unrelated to the purposes of the act. We don't know who the enemy is that we are talking about. We don't have an emergency that is current. Yet, with a very minor exception contained in Mr. Bergsten's statement, you have completely failed to offer any plausible legislation to take the place of this act.

LACK OF ADMINISTRATION COOPERATION

I had some indication that this was going to be so, and I have a prepared statement. I don't propose to read it all, but I would like to read part of it because I think that what has happened here is that the State Department, in particular, has backed away from the position it took at the time of the adoption of the National Emergencies Act.

Section 5(b) of the Trading With the Enemy Act was exempted from repeal by the National Emergencies Act at the strong request of the administration. The purpose of the exemption was not, as Mr. Katz alleges on page 1 of his statement, "to permit thorough consideration of the continuing need and justification for such legislation." On the contrary, the report of the Committee on the Judiciary states, with regard to those laws exempted from termination by the act, "It is intended that within a short time those provisions of law can be converted from the 'emergency' portions of the code in which they now appear to standard, nonemergency sections." The exemptions from repeal were granted because the use of these so-called emergency provisions to authorize the routine conduct of policy made such conversion a complex problem. It was not meant to exempt forever the Trading With the Enemy Act from the intent of Congress that emergency powers should not be available for routine application.

The Department of State agreed with this approach. The Department stated on various occasions, by letter and in testimony, that it—

> Has not opposed, and does not oppose, the replacement of section 5(b) by other permanent legislation. We believe there are a number of serious legal and policy questions in connection with any such legislation which will require protracted congressional consideration, and we are convinced that it would be highly imprudent to cast away the authority of section 5(b) without any assurance of such replacement.

On February 15, I formally invited the four agencies affected by section 5(b) to join the subcommittee in the consideration of these legal and policy questions. Then I stated the questions which you have quoted in your statement.

Subsequent contacts at the staff level indicated that these questions were not receiving serious consideration. On March 23, I wrote the Under Secretary of State for Economic Affairs, with copies to the other agencies involved, stating my concerns and posing two further

questions intended to stimulate high level policy thinking on these issues.

I asked for comments on H.R. 2382, the Economic War Powers Act, and I raised for discussion purposes the possibility of imposing foreign policy controls on U.S. bank lending abroad, and asked whether section 5(b) was adequate authority for such controls, or whether new legislation might be needed.

I am sorry to say that the statements we have just heard are responsive to none of the subcommittee's concerns. I regard the statements as a retreat from the State Department's testimony on the National Emergencies Act. What you have done is to put us in the position of drafting our own legislation, which we will have to do, and to try to bring some sense out of this "Alice in Wonderland" situation that we are in today with the Trading With the Enemy Act, and which you seem not to recognize in any way whatever.

As for the argument that the freezing of assets might be unconstitutional absent an emergency, Mr. Bergsten, I really think that your statement suggests that we are playing fast and loose with the Constitution. We are relying on an emergency which does not exist to justify a taking, or actions taken by the administration.

I frankly have not been as angry about anything done by the executive branch in a long time, and I am sorry that it is this administration that comes forward with this incredible position. This is all I have to say.

Mr. BERGSTEN. Could I respond?

Mr. BINGHAM. Go ahead and respond in any way you like.

Mr. BERGSTEN. I would like to respond to a couple of points in the questions you raised.

First, it is to put on the record that certainly your questions did get very serious and high level consideration in the Treasury. We had at least four or five meetings where we discussed the whole range of issues that were raised. This is the considered position that we came forward with, and proposed for acceptance by the other agencies, which was accepted by them.

DEALING WITH OUTDATED NATIONAL EMERGENCIES

Second, I would respectfully take issue with your characterization of the changes proposed in my statement, as minor changes. What we would try to do with our proposals is to drastically change for the future the precise situation that you think, quite rightly, raises the reliance on outdated emergencies for exercise of this authority, and I cited at least one example in the statement where we felt that this had been done improperly.

So what we are trying to do with this proposal is, in fact, build on the precedents that were put forward in the National Emergencies Act, to apply it to the section forever and ever in the future. So that the kind of situation that you have raised questions about in the past would not arise again.

We have proposed that a new emergency be declared, and that reports be sent forward every 6 months, and that it automatically terminate in a year unless explicitly renewed and extended by the President, all of which we think would provide quite a bit of control

and deal exactly with the problem that you raised, which we share your judgment on.

The remaining question, I think, that you then raised, as I understand it, is what to do about the status quo, what to do about existing situations which have been in effect for quite a long time, some running back, in fact, into the 1940's.

There, as we looked at it, the questions really came down to: The negotiating position of the administration, including the fairness to American citizens who have claims on other countries whose assets we now hold under these authorities. We did make a distinction, in our thinking, between the continuation of the past where we felt the authority should continue to be exercised for the reasons that I indicated, and the future, where we would require a completely new procedure and propose amendments to the legislation. The new legislation which would change completely the situation for the future and, thereby, avoid forever into the future a renewal of exactly the kind of problem that you are now citing.

Under what we have proposed, if accepted by the Congress there would never be a situation 20 or 25 years from now, where any Member of the Congress would make the charge which you now quite rightly raise. We want to deal with that situation. I, therefore, would not, respectfully, take the view that what we have proposed are minor changes. We think that it would provide a fundamental change by altering the whole implementation of this act for the future.

INDEFINITE EXTENSION OF DECLARED NATIONAL EMERGENCIES

Mr. BINGHAM. Perhaps I overstated it, Mr. Bergsten. I do think that your proposal No. 1 is certainly an advance, that any new action requires proclamation of a new national emergency. But I am not impressed with what you have to say in paragraph 2.

To be sure, the measure automatically expires on the anniversary of the national emergency, but all the President has to do is not to say that there is a new emergency, or that an emergency exists, but to transmit to Congress a notice stating that such emergency measures are to continue in effect after such anniversary.

In other words, an emergency arises once, and all the President has to do is to say every year that the measure ought to continue in effect. He does not have to find that the emergency continues. That might be quite a different proposition if it did.

The reporting provisions in paragraph 3 certainly are an improvement over what we have today, because until we began in this subcommittee to really examine what had been done under this act, and to publish the material that we did publish last year, there was very little knowledge, indeed, of what had been done under this act.

Now I think that you have to face the facts, which are that the executive branch wants to be free to continue to act with an enormous degree of discretion on the basis that an emergency exists, although by no commonsense application of the term could the situation be called an emergency.

The threat of Communist aggression, if you will, or the threat of Communist competition which we face in the world, Mr. Katz, is a permanent situation. It is not an emergency unless you are going to

define the situation that exists in the world today as a permanent emergency. I don't see how you justify the use of the term.

It seems to me to be the essence of your statement that we are in a permanent emergency. If so, we need permanent legislation, and not emergency legislation. I realize that it is convenient for the executive branch to have these powers. I have been in the executive branch myself. I know that they don't like Congress meddling in things.

But from the congressional point of view, the picture is an entirely different one. Up until now the reaction of the subcommittee, and the reaction of the witnesses that we have had, has been that the situation that we are in is quite an incredible one, and it has to be substantially altered to try to conform with reality and with principle.

With some exceptions—I will take back the word "minor"—I don't think that the heart of the problem has been addressed.

Mr. BERGSTEN. Since you took that one back, could I push slightly for your comments on my second proposal. All we did there, Mr. Chairman, was to adopt precisely the language in the National Emergencies Act, and tried to apply it to 5(b). The notion that on the anniversary of the declaration of some measures under an emergency, those measures would have to be extended. We adopted in this context what has already been adopted by the Congress in the National Emergencies Act.

Mr. BINGHAM. Excuse me, but with a very important difference. You reject the notion of possible congressional veto in that finding.

Mr. BERGSTEN. By concurrent resolution, but not by act of Congress, of course.

Mr. BINGHAM. An act of Congress requires concurrence of the Executive.

MAKING EXPORT ADMINISTRATION ACT PERMANENT

Mr. KATZ. Mr. Chairman, may I just say that with the exception of the case that you cited, I would be surprised to hear an argument that the other controls in the Export Administration Act, particularly the financial controls, should be unblocked.

Mr. BINGHAM. Should be what?

Mr. KATZ. That those controls should be released. With a different kind of an Export Administration Act, a permanent Export Administration Act, obviously there would be no need to use this authority. Some of the programs under the Export Administration Act, I would concede are hard to justify under the emergency. But there certainly is a need for the trade controls themselves, which I think the Congress recognizes.

The balance-of-payment measures that were resorted to under section 5(b) have been authorized under other permanent legislation, and there may be a number of specific measures that have been taken, or conceivably might be taken, under this authority which could suitably be incorporated into a permanent legislation.

I think that it was in that sense that we said that it could be replaced by permanent legislation. What is difficult for us to accept, in reflection on this problem, is denial to the President of the authority to take action in unforeseen emergencies.

Mr. BINGHAM. In this last case, the unforeseen emergency was the fact that because of procedural objections in the Senate, an extension of the Export Administration Act did not get through the Congress.

Mr. KATZ. I think that a lapse of our trade controls would certainly raise some serious questions in terms of national interest and national policy.

Mr. BINGHAM. If there had not been the backup of the Trading With the Enemy Act, which was known to be there, the stalemate might not have occurred. There would have been some real pressure. We know that the administration was not keen to have the Export Administration Act extended last fall when it was about to expire. They said, "We can rely on the Trading With the Enemy Act."

So you have a situation where the executive branch can, by executive determination only, substitute for a very complicated piece of legislation, and retain all the powers that are granted by that complicated piece of legislation. It just strikes me as an absurd situation.

Mr. KATZ. But the reforms that have been suggested, I think, would deal with that.

Mr. BINGHAM. I think that I have made my point.

Mr. Cavanaugh.

Mr. CAVANAUGH. Mr. Chairman, I think you have made your point, and I concur in it. I would hope that it might have some impact in terms of eliciting some more pertinent proposals from the administration.

Mr. BINGHAM. Let me ask that you, at least, review and give us your specific comments on the proposals for new legislation that were submitted to us by the witnesses at our previous hearings, and particularly by Mr. Timothy Stanley. I don't know whether you have read them. They seem to me, without having examined them in great detail, to make a great deal of sense. We would like to have your specific reactions.[1]

One final point. A good part of your statement was directed at my bill. I, of course, assumed that action repealing section 5(b) would be accompanied by substituting something in its place. I call your attention to the fact that in my questions directed to the executive branch, I did not imply in the least that we don't need some legislation to take the place of section 5(b). So, in a sense, in arguing as you did against total repeal, you were making an unnecessary argument.

Mr. Whalen.

PROPOSED ADMINISTRATION AMENDMENTS

Mr. WHALEN. Let me distinguish between Mr. Katz's and Mr. Bergsten's recommendations.

As I understand it, Mr. Katz, what you are saying is that if we eliminate 5(b), we then should put it back into new law. Is that correct?

Mr. KATZ. That is essentially right, although my testimony was intended to be consistent, and I think is consistent, with what Mr. Bergsten presented. I phrased the proposals somewhat differently. I put them in the context of the National Emergencies Act, and I indicated that there were a number of provisions of the National Emergencies Act that we could accept as amendments to section 5(b).

[1] The information requested appears on p. 221.

Mr. Bergsten, I think, made the same points, but somewhat differently. So we are prepared to accept substantial change in the procedures. But what we do feel is necessary is some authority for the President to deal with emergencies and wartime situations. I don't think this is at issue.

Mr. WHALEN. You both agree that in any new situation, the President declare an emergency for that particular situation.

Mr. BERGSTEN. Yes, absolutely.

Mr. KATZ. Yes.

Mr. WHALEN. You both agree that there should be a termination date for that particular emergency.

Mr. KATZ. Yes.

Mr. BERGSTEN. Absolutely.

Mr. WHALEN. You suggested that it should be every year.

Mr. BERGSTEN. It is in the National Emergencies Act. We simply drew on that precedent.

Mr. WHALEN. You both would disagree with respect to the incorporation of a congressional veto.

Mr. BERGSTEN. That is a fundamental constitutional difference that exists between the two branches. We would continue to oppose that.

Mr. BINGHAM. Would you yield for a moment?

Mr. WHALEN. Yes.

Mr. BINGHAM. I notice, as I look at it, sir, a difference between your phrasing of section 202(d) of the National Emergencies Act, and paragraph (2) in Mr. Bergsten's statement. It is minor, but I think that it is important. According to the statement by Mr. Katz, section 202(d) provides for termination of any national emergency on its anniversary unless the President publishes in the Federal Register, and transmits to Congress, within the 90-day period prior to each anniversary date, a notice stating that such emergency is to continue in effect. The statement that you make in paragraph (2), on page 12 of your statement, Mr. Bergsten, is that the President would simply transmit a notice that the emergency measures are to continue in effect. I think that there is a difference because one would require the President to affirm that the emergency is still in effect, and the other simply that the measures would continue in effect.

Mr. BERGSTEN. You are quite right, Mr. Chairman. It is sloppy drafting on our part. The State Department's statement did accurately cite the language in the National Emergencies Act which would require that the emergency itself be renewed on the anniversary. That is what we intended to say, and did not do it clearly. I would clarify it that way.

Mr. BINGHAM. How would you feel about language that would indicate that the President would be required to describe the emergency every year.

Mr. KATZ. We certainly would be willing to consider that. I think that it would be appropriate.

Mr. BERGSTEN. It would be appropriate to indicate why the emergency continued. It seems to me to be a natural concomitant of stating that it did continue in his finding, and certainly that was implicit in our proposal.

EMBARGO ON CUBA

Mr. BINGHAM. I don't want to pursue this too far, but just one further question on that point.

At the present time, the embargo that we have imposed on Cuba exists by reason of an emergency. What is the emergency that requires that embargo to be continued?

Mr. KATZ. The legal reference, or the state of fact?

Mr. BINGHAM. The state of fact.

Mr. KATZ. The state of fact is that our relations are still unsettled with them. I think that there is a question about the direction of their policies with some of the allied countries.

Mr. BINGHAM. That is a pretty poor definition of an emergency, Mr. Katz.

Mr. WHALEN. Under what specific emergency was this imposed?

Mr. KATZ. Under the 1950 emergency, the Communist aggression.

Mr. WHALEN. That is under 5(b).

Mr. KATZ. I think that there have been some recent suggestions on this point, but I would rather not get drawn into a discussion of Cuban policy, if you don't mind, Mr. Chairman.

Mr. BINGHAM. I don't mind on the merits of the embargo. I realize that this is a very arguable question. But I think that this is a different question from arguing that there is an emergency which justifies the President imposing that embargo.

Mr. KATZ. Your point is certainly well taken that the description of the emergency may not, 27 years after the fact, be precisely the same. That is a point that we accept. Indeed, if the 202(d) formulation were accepted we would have to rejustify it in very precise terms on an annual basis. I think that point is certainly well taken.

RECASTING 5(b) AUTHORITIES IN NONEMERGENCY LEGISLATION

Mr. BINGHAM. There is nothing at all that is done now under the Trading With the Enemy Act, in 5(b), which could not be done under nonemergency legislation, if that legislation were properly drawn.

Mr. WHALEN. Putting it more succinctly, could we impose the embargo under some other section of the law. Is that correct?

Mr. BINGHAM. I meant taking into account the possibility of new legislation. What we have been asking for and seeking here is some reasonable way of distinguishing between what is called for in genuine emergencies, and what kind of powers the administration should have in normal times. The answer we get, in effect, is that we have to operate on the principle that an emergency exists all the time.

Mr. KATZ. I don't think that this is correct, Mr. Chairman. I think in fairness we have lived with this legislation for a long time because it was the only thing that we had.

I think that you have quite properly raised some questions about the use of this power in the past. It is certainly appropriate to consider changes in that. I am not sure exactly where we disagree, except in one clear area, the question of the concurrent resolution.

As you indicated just a while ago, perhaps it was a mistake to suggest that you were seeking the repeal of section 5(b). I gather from what you say that you recognize that the President does require cer-

tain emergency powers, but you believe they ought to be used only in true emergencies and the emergencies ought to be current. There, I think, we would agree.

Mr. BINGHAM. We have also suggested that some of the actions that are now taken under the theory that an emergency exists be provided for in legislation which is to deal with nonemergencies. As I understand the testimony, both of you indicate that it is not possible to do any of the things that we now do on the theory that emergencies exist, under some other theory by appropriate legislation.

Mr. KATZ. I have suggested two instances. One would require making the Export Administration Act permanent. Were the Export Administration Act permanent legislation, that problem would not arise.

The second, on page 6 of my statement, has to do with controls on exports from U.S. subsidiaries abroad, which could be handled under the Export Administration Act as well, if that act were amended along the lines I suggested. Those are two areas.

FREEZING OF ASSETS

Mr. BERGSTEN. Mr. Chairman, on the foreign assets control, the fact is that these are rather extreme steps that the U.S. Government takes. Freezing the assets of another country is not a step to be taken lightly. Barring all current transactions with another country is not a step to be taken lightly.

We do feel that such steps should only be taken when there is a real emergency. That is at the root of why we really prefer to keep an emergency statute a la 5(b), than go to something else which you have termed as nonemergency legislation. These are very strong steps to be taken only in extreme circumstances, and that is why we think that it should require the declaration by the President of a national emergency.

Mr. BINGHAM. If I am not mistaken, you still maintain asset controls with respect to China, do you not?

Mr. BERGSTEN. I have reviewed the history of this carefully, and there are some big problems that emerge. One is the use of an existing emergency for an unrelated purpose, and we can all agree that this has been done in questionable ways.

The second is the extension over time of an "emergency," after it may not be such an emergency. We have proposed means to try to deal with that by the automatic termination on the anniversary, unless explicitly extended, with information, reporting requirements, and so forth.

As I have reviewed this history carefully, I come to three conclusions. It should be emergency legislation because these are extreme steps, and I would not want them taken, as a citizen, aside from being a policy official, in anything less than what would be carefully deliberated considerations of what is called a national emergency.

There are the two problems: There is the unrelated emergency use, and there is the extension of these controls over time beyond, perhaps, initial justification for them. Our proposal tried to deal with these issues.

Mr. KATZ. Mr. Chairman, let me say that there is another area where the Congress made a change, and that is in the Trade Act that we

referred to earlier. There is specific authority now for balance-of-payment measures of the kind that were taken in 1971.

Such measures would not have to be taken pursuant to section 5(b) in the future. There are specific circumstances for the use of that authority spelled out in the Trade Act of 1974.

DEALING WITH CURRENT 5(b) ASSET CONTROLS

Mr. BINGHAM. Let me come back to what you just said. Asset control or freezing is an extreme measure and should be done only in emergency cases.

Let me again ask the question, What is the emergency that requires us to continue control over the Chinese assets, or the Cuban assets?

Mr. BERGSTEN. I think there we do face a legacy of the past which is justified in two senses. One is that given the continued state of relations between the United States and major Communist powers, which includes North Korea, Vietnam, and Cambodia, as well as China, there certainly are something less than cordial relationships which do stem directly from the original conditions in which that emergency declaration was made.

Second, and I think more pragmatically, and I think that you are raising a pragmatic question, and I would like to respond pragmatically, we are in a situation where we are trying to normalize relations with those countries. Hopefully, over time, we will do so with all of them. Some look more on the track right now than others. Part of those negotiations relate to our holding of those frozen assets. They give us some important bargaining power, and furthermore they provide an assurance to American citizens, whose assets in those countries were seized, that there will be some means by which the United States can defend their just rights.

Mr. BINGHAM. Again, you are talking about the merits of something, but you are not addressing yourself to the fundamental question of whether it is legitimate to base those actions on the presumed existence of an emergency. You cannot seriously say that there is an emergency element in our relations with Communist China, or with Cuba today, that warrants the extraordinary steps that you have said they are, absent an emergency. Perhaps they are justified. I am not saying that they are not. I am rather inclined to think they are, but I just don't think it is right for us to base those actions on a false premise.

Mr. BERGSTEN. I think that I consider that point important, Mr. Chairman. It does relate to the history as well as to the current situation. There are, as I said in my statement, similar points involved about whether asset control would be legal other than under an emergency proclamation. That, in turn, relates to the pragmatic situation that we find ourselves in as we try to use that legacy of the past to help normalize relations with the countries involved.

I guess all we are really saying that is different from you is, we would certainly like to provide a clean slate for the future while you want to make that retroactive in addition. What we are raising in response to that is what we would regard as some pragmatic concerns. I don't think that we have any fundamental differences

on what is to be done from here on out in terms of judicious implementations of these powers.

Mr. BINGHAM. I think that we have kind of gone round and round on this.

Gentlemen, thank you, and we will look forward to your comments on those specific proposals.

The hearing is adjourned.

[Whereupon, at 3:40 p.m. the subcommittee adjourned, subject to the call of the Chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

THURSDAY, MAY 5, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met at 3 p.m. in room 2200, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee), presiding.

Mr. BINGHAM. The subcommittee will be in order.

Today the Subcommittee on International Economic Policy and Trade concludes, at least for the time being, its hearings entitled "Emergency Controls on International Economic Transactions," on H.R. 1560 and H.R. 2382. The subcommittee has received no further requests to testify. I have asked the subcommittee staff to draft new legislation incorporating some of the recommendations we have received into a package of draft amendments to section 5(b) of the Trading With the Enemy Act and, where appropriate, the Export Administration Act.

I expect that the agencies involved will cooperate with the staff in developing the new draft. I would also like to encourage all members of the subcommittee to submit their suggestions to the staff as soon as possible. When the draft is ready, hopefully next week, I plan to introduce it and, unless there is need for further hearings, to proceed directly to markup the week of May 16. Under the National Emergencies Act we have to report the bill out of the full committee by mid-June. Statements for the record should be submitted by May 16.

Our final witnesses are Mr. Homer Moyer, Deputy General Counsel, Department of Commerce, and Mr. Irving Jaffe, Deputy Assistant Attorney General, Department of Justice.

I would like to welcome you to the subcommittee and to apologize for having to cancel at the last minute the hearing originally scheduled for April 27. That was unavoidable in view of the other matters going on here on the Hill that day. I appreciate your rearranging your schedules so you could be here today.

I will recognize Mr. Moyer first, then Mr. Jaffe, and then we will open it up for questions.

STATEMENT OF HOMER E. MOYER, JR., DEPUTY GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Legal and professional experience:
Acting General Counsel, Department of Commerce (since January 1977);
Deputy General Counsel, Department of Commerce (since April 1976);
Covington & Burling, Washington, D.C. (August 1973–April 1976);
Public Law Education Institute, Washington, D.C. (May 1971–June 1973)—primary author of "Justice and the Military;" and
Office of the Judge Advocate General of the Navy, Washington, D.C. (March 1968–February 1971).
Education:
Yale Law School, LL.B., 1967;
Emory University, B.A., Economics.
Personal Data:
Age: 34 (born Nov. 20, 1942, Atlanta, Ga.). Married (1974).

Mr. MOYER. Mr. Chairman, thank you for the invitation to testify today on H.R. 1560, a bill "to repeal section 5(b) of the Trading With the Enemy Act of 1917." I am Homer E. Moyer, Jr., the Deputy General Counsel of the Department of Commerce.

Section 5(b) provides the President, or his designee, with specified powers over certain types of economic activity by any person, or with respect to any property, subject to U.S. jurisdiction during time of war or national emergency.

As you noted in your letter of invitation, section 5(b) was specifically exempted from the general termination of emergency powers and authorities recently accomplished by the National Emergencies Act—Public Law 94–412. The act also provides for congressional study and investigation of section 5(b); it is pursuant to that mandate that this hearing is taking place.

Mr. Chairman, let me say at the outset that the Commerce Department welcomes and supports the practice of periodic congressional review of existing statutes. That process, in my view, is an entirely appropriate and important legislative activity.

Representatives of the State and Treasury Departments have already outlined to you what effect the repeal of section 5(b) would have on programs they administer. I should like to discuss, from the perspective of the Department of Commerce, the consequences that would attend repeal of section 5(b).

EXPORT ADMINISTRATION ACT EXTENSION

The most important consequence involves the Export Administration Act, which, as you know, the Department of Commerce administers. This act, which is a temporary statute, provides authority for the imposition of a variety of controls on U.S. exports, principally for reasons relating to national security, foreign policy, and short supply.

Four times in the last 5 years the Export Administration Act has expired, for periods of from several weeks to several months. Each time the authority of section 5(b) was invoked to continue the Nation's export controls until the Export Administration Act was legislatively extended. Without the standby authority of section 5(b), the Nation would have been left on each of those occasions without controls on the export and reexport of U.S. goods and technology.

Such a lapse in export control authority would have serious consequences. For example, during such a period exports having foreign policy significance—such as exports that might aid foreign nations in expanding their nuclear capabilities—could proceed legally unhindered. If the act were to expire during a period of critical short supply, the unregulated export of scarce products, such as petroleum, could have a serious adverse impact on important sectors of the domestic economy.

More importantly, during an interval with no export control authority, products and technology otherwise controlled for national security reasons could be freely and legally shipped to the Soviet Union or other controlled countries. Not only would such exports be contrary to U.S. policy, but the consequences of such a window could extend beyond the expiration period.

The transfer of strategic technology during a temporary lapse in export control authority could result in an irretrievable loss, for a one-time acquisition of strategic technology could obviously provide the basis for unlimited production of strategic commodities in the future.

Last, expiration of all export control authority would leave the Department without authority to administer this country's antiboycott regulations, and thereby implement this important national policy.

Those consequences are no only themselves undesirable, but also disruptive in a larger sense. Expiration of export control authority could, for example, terminate the statutory basis for U.S. implementation of international strategic trade controls to which this country is agreed, thereby generating tension with our COCOM partners. And even the potential of periodic lapses of export control authority introduces an undesirable measure of uncertainty into the marketing plans and operations of U.S. businesses.

My recitation of these undesirable consequences is, I think, neither speculative nor alarmist. It is a matter of record that the Export Administration Act has been permitted to expire 4 times in the past 5 years. In the context of this hearing, the reasons the act was not extended are beside the point. What is important is that such lapses did occur; this fact necessarily shapes the Department's view of the proposal to repeal 5(b).

CRISES IN INTERNATIONAL COMMERCE

Apart from its possible effect on the Export Administration Act, the simple repeal of section 5(b) could affect at least one other area in which the Commerce Department has responsibilities. Repeal would eliminate statutory authority that is occassionally needed by the executive branch to deal on an emergency basis with crises related to international commerce.

One clear illustration was the President's imposition, on New Year's Day 1968, of foreign direct investment controls to counter record adverse balance-of-payments deficits suffered in 1967. To be effective, this action had to be taken unannounced, on an emergency basis. Had the President been required to seek new legislative authority to impose those controls, vast amounts of investment funds could have been shifted overseas prior to enactment of the needed legislation, thereby defeating the program's objectives. These controls, which were ad-

ministered by the Commerce Department, were based directly upon the authority of section 5(b). Thus, the authority contained in section 5(b) has served—and continues to serve—important national interests. Conversely, we question some of the reasons advanced in support of the repeal of 5(b).

For example, Mr. Chairman, when you introduced proposed legislation last September to repeal section 5(b), you observed that section 5(b), would likely be invoked upon expiration of the Export Administration Act on September 30 and that the executive branch "would claim freedom to regulate exports entirely at its own discretion, without reference to any of the statutory guidelines provided by Congress in the Export Administration Act." This concern has, I think, proved to be academic. Each time the act has expired, the policies and regulations in effect prior to expiration were kept in effect during the interim.

Also, some witnesses before this subcommittee have implied that 5(b) should be repealed, because it is now being used in circumstances not contemplated at the time of enactment. This fact alone does not, in my judgment, warrant repeal. Numerous statutes are currently applied in ways not envisioned by their drafters, and public policy is often well served by such applications.

For these reasons the Department of Commerce opposes enactment of a bill that would simply repeal section 5(b) of the Trading With the Enemy Act. This is not meant to suggest, however, that section 5(b) of the Trading With the Enemy Act is sacrosanct. What is vitally important is that there exist authority for the continuous operation of the country's export control program and for the imposition of emergency controls in the area of international commerce. That authority could be established outside of section 5(b) is, I should think, obvious.

Indeed, some of the issues raised by witnesses before this subcommittee about the operation of section 5(b) are not frivolous. Some have questioned, for example, whether the grant of authority under section 5(b) is broad enough to support the various controls that have been imposed in its name. Others have urged that the specific controls imposed should be substantially and directly related to the declared emergency. These contentions have been substantially undercut by a series of court decisions. Moreover, I note that twice the Commerce Department, prior to asking the President to invoke the authority of section 5(b) to continue our export control program, has sought the opinion of the Department of Justice and has been advised that our proposed use of section 5(b) authority to continue the export control program including our antiboycott regulations, was completely proper. The point, however, is not whether prior witnesses were correct, but, rather, that congressional action could render such issues moot.

MAKE EXPORT ADMINISTRATION ACT PERMANENT

One obvious step that my observations suggest, and that would plainly satisfy some of the most important concerns of the Commerce Department, is congressional action to make the Export Administration Act permanent legislation. The arguments favoring such action appear to be strong.

The Export Control Act and the Export Administration Act have been continually enacted and reenacted as temporary legislation since 1949. Export controls have accordingly been imposed for approximately 30 years, and there appears to be no disagreement between the executive and legislative branches over the need to continue such controls for the foreseeable future.

And permanent legislation would, of course, in no way impair Congress ability to maintain oversight responsibilities or to enact amendments to the Export Administration Act, as needed.

Mr. BINGHAM. I am sorry but we will have to suspend and go vote on the floor. There may be a second vote following immediately. We will resume as soon as possible.

[A brief recess was taken.]

Mr. BINGHAM. The hearing will be in order.

Will you please proceed, Mr. Moyer.

Mr. MOYER. In light of the time, Mr. Chairman, I think with your permission I might touch briefly on some of my remaining points and submit the entirety of my statement for the record.

Mr. BINGHAM. Thank you. Your entire statement will appear in the record.[1]

Mr. MOYER. There are, in addition to my earlier suggestion that the Export Administration Act be made permanent legislation, other possible legislative steps that would be responsive to the concerns of at least the Department of Commerce. Some legislative updating and revision of section 5(b) may well be desirable. Among the possibilities the subcommittee may wish to consider are the following:

SUGGESTED REVISIONS BY THE COMMERCE DEPARTMENT

(1) Making those sections of the National Emergencies Act relating to executive branch procedures applicable to activities under section 5(b). I refer specifically to the requirements that national emergency proclamations be specific and be published, that the President make certain reports to Congress, and that national emergencies terminate automatically unless expressly continued by the President.

(2) Alternatively, a simple requirement that when section 5(b) authority is needed for the imposition of major controls—such as the temporary continuation of the export control program—the President must declare a new state of national emergency pursuant to the provisions of section 201(a) of the National Emergencies Act.

(3) Elimination of the title, the "Trading With the Enemy Act," which has become an irritating misnomer to our trading partners who have been affected by controls imposed under 5(b) authority. Authorities relating to non-war-time situations could be separated from the rest of the statute or could be retained only in title 12 U.S.C. 95a.

(4) An amendment to allow the President, under certain conditions and pursuant to specified findings, to invoke certain enumerated section 5(b) powers in times of peace for crisis situations that do not amount to "national emergencies."

Should the subcommittee wish to pursue any of these possibilities, we would be happy to offer the subcommittee staff our assistance in drafting appropriate statutory language.

[1] Mr. Moyer's prepared statement appears on p. 126.

The remainder of my prepared statement, Mr. Chairman, responds specifically to the questions in the committee's letter of invitation, and I would propose simply to submit those for the record.

[Mr. Moyer's prepared statement follows:]

PREPARED STATEMENT OF HOMER E. MOYER, JR., DEPUTY GENERAL COUNSEL, DEPARTMENT OF COMMERCE

Mr. Chairman, thank you for the invitation to testify today on H.R. 1560, a bill "to repeal Section 5(b) of the Trading With the Enemy Act of 1917." I am Homer E. Moyer, Jr., the Deputy General Counsel of the Department of Commerce.

Section 5(b) provides the President, or his designee, with specified powers over certain types of economic activity by any person, or with respect to any property, subject to U.S. jurisdiction during time of war or national emergency. As you noted in your letter of invitation, Section 5(b) was specifically exempted from the general termination of emergency powers and authorities recently accomplished by the National Emergencies Act (Public Law 94-412). That Act also provides for Congressional study and investigation of Section 5(b); it is pursuant to that mandate that this hearing is taking place.

Mr. Chairman, let me say at the outset that the Commerce Department welcomes and supports the practice of periodic Congressional review of existing statutes. That process, in my view, is an entirely appropriate and important legislative activity.

Representatives of the State and Treasury Departments have already outlined to you what effect the repeal of Section 5(b) would have on programs they administer. I should like to discuss, from the perspective of the Department of Commerce, the consequences that would attend repeal of Section 5(b).

The most important consequence involves the Export Administration Act, which, as you know, the Department of Commerce administers. This Act, which is a temporary statute, provides authority for the imposition of a variety of controls on U.S. exports, principally for reasons relating to national security, foreign policy, and short supply. Four times in the last 5 years the Export Administration Act has expired, for periods of from several weeks to several months. Each time the authority of Section 5(b) was invoked to continue the Nation's export controls until the Export Administration Act was legislatively extended. Without the standby authority of Section 5(b), the Nation would have been left on each of those occasions without controls on the export and reexport of U.S. goods and technology.

Such a lapse in export control authority would have serious consequences. For example, during such a period exports having foreign policy significance—such as exports that might aid foreign nations in expanding their nuclear capabilities—could proceed legally unhindered. If the Act were to expire during a period of critical short supply, the unregulated export of scarce products, such as petroleum, could have a serious adverse impact on important sectors of the domestic economy. More importantly, during an interval with no export control authority, products and technology otherwise controlled for national security reasons could be freely and legally shipped to the Soviet Union or other controlled countries. Not only would such exports be contrary to U.S. policy, but the consequences of such a window could extend beyond the expiration period. The transfer of strategic technology during a temporary lapse in export control authority could result in an irretrievable loss, for a one-time acquisition of strategic technology could obviously provide the basis for unlimited production of strategic commodities in the future. Lastly, expiration of all export control authority would leave the Department without authority to administer this country's antiboycott regulations, and thereby implement this important national policy.

These consequences are not only themselves undesirable, but also disruptive in a larger sense. Expiration of export control authority would, for example, terminate the statutory basis for U.S. implementation of international strategic trade controls to which this country is agreed, thereby generating tension with our COCOM partners. And even the potential of periodic lapses of export control authority introduces an undesirable measure of uncertainty into the marketing plans and operations of U.S. businesses.

My recitation of these undesirable consequences is, I think, neither speculative nor alarmist. It is a matter of record that the Export Administration Act has been permitted to expire four times in the past 5 years. In the context of this hearing, the reasons the Act was not extended are beside the point. What is important is that such lapses did occur; this fact necessarily shapes the Department's view of the proposal to repeal 5(b).

Apart from its possible effect on the Export Administration Act, the simple repeal of Section 5(b) could affect at least one other area in which the Commerce Department has responsibilities. Repeal would eliminate statutory authority that is occasionally needed by the executive branch to deal on an emergency basis with crises related to international commerce. One clear illustration was the President's imposition, on New Year's Day 1968, of foreign direct investment controls to counter record adverse balance of payments deficit suffered in 1967. To be effective, this action had to be taken unannounced, on an emergency basis. Had the President been required to seek new legislative authority to impose those controls, vast amounts of investment funds could have been shifted overseas prior to enactment of the needed legislation, thereby defeating the program's objectives. These controls, which were administered by the Commerce Department, were based directly upon the authority of Section 5(b).

Thus, the authority contained in Section 5(b) has served—and continues to serve—important national interests. Conversely, we question some of the reasons advanced in support of the repeal of 5(b).

For example, Mr. Chairman, when you introduced proposed legislation last September to repeal Section 5(b), you observed that Section 5(b) would likely be invoked upon expiration of the Export Administration Act on September 30 and that the Executive branch "would claim freedom to regulate exports entirely at its own discretion, without reference to any of the statutory guidelines provided by Congress in the Export Administration Act."

This concern has, I think, proved to be academic. Each time the Act has expired, the policies and regulations in effect prior to expiration were kept in effect during the interim.

Also, some witnesses before this subcommittee have implied that 5(b) should be repealed because it is now being used in circumstances not contemplated at the time of enactment. This fact alone does not, in my judgment, warrant repeal. Numerous statutes are currently applied in ways not envisioned by their drafters, and public policy is often well served by such applications.

For all of the reasons I have stated, the Department of Commerce opposes enactment of a bill that would simply repeal Section 5(b) of the Trading With the Enemy Act.

This is not meant to suggest, however, that Section 5(b) of the Trading With the Enemy Act is sacrosanct. What is vitally important is that there exist authority for the continuous operation of the country's export control program and for the imposition of emergency controls in the area of international commerce. That this authority could be established outside of section 5(b) is, I should think, obvious.

Indeed, some of the issues raised by witnesses before this subcommittee about the operation of section 5(b) are not frivolous. Some have questioned, for example, whether the grant of authority under section 5(b) is broad enough to support the various controls that have been imposed in its name. Others have urged that the specific controls imposed should be substantively and directly related to the declared emergency. These contentions have been substantially undercut by a series of court decisions. Moreover, I note that twice the Commerce Department, prior to asking the President to invoke the authority of Section 5(b) to continue our export control program, has sought the opinion of the Department of Justice and has been advised that our proposed use of Section 5(b) authority to continue the export control program, including our anti-boycott regulations was completely proper. The point, however, is not whether prior witnesses were correct, but rather that Congressional action could render such issues moot.

One obvious step that my observations suggest, and that would plainly satisfy some of the most important concerns of Commerce Department, is Congressional action to make the Export Administration Act permanent legislation. The arguments favoring such action appear to be strong. The Export Control Act and the Export Administration Act have been continually enacted and reenacted as temporary legislation since 1949. Export controls have accordingly been imposed for approximately thirty years, and there appears to be no disagree-

ment between the Executive and Legislative branches over the need to continue such controls for the foreseeable future.

And permanent legislation would, of course, in no way impair Congress' ability to maintain oversight responsibilities or to enact amendments to the Export Administration Act, as needed.

There are, of course, other possible legislative steps that would be responsive to the concerns of at least the Department of Commerce. Some legislative updating and revision of Section 5(b) may well be desirable. Among the possibilities the subcommittee may wish to consider are the following:

Making those sections of the National Emergencies Act relating to Executive Branch procedures applicable to activities under Section 5(b). I refer specifically to the requirements that national emergency proclamations be specific and be published, that the President make certain reports to Congress, and that national emergencies terminate automatically unless expressly continued by the President.

Alternatively, a simple requirement that when Section 5(b)'s authority is needed for the imposition of major controls—such as the temporary continuation of the export control program—the President must declare a new state of national emergency pursuant to the provisions of Section 201(a) of the National Emergencies Act.

Elimination of the title, the "Trading With the Enemy Act," which has become an irritating misnomer to our trading partners who have been affected by controls imposed under 5(b) authority. Authorities relating to non-wartime situations could be separated from the rest of that statute or could be retained only in 12 U.S.C. 95a.

An amendment to allow the President, under certain conditions and pursuant to specified findings, to invoke certain enumerated Section 5(b) powers in times of peace for crisis situations that do not amount to "national emergencies."

Should the subcommittee wish to pursue any of these possibilities, we would be happy to offer the subcommittee staff our assistance in drafting appropriate statutory language.

Having made these general observations, I shall now address the specific questions posed in the subcommittee's letter of invitation.

Question 1. In what specific respects should Section 5(b) be repealed as obsolete?

Answer. Given the critically important nature of actions recently taken under the authority of Section 5(b), obsolescence appears not to be an apt characterization. The title of the entire Act, however, may be somewhat anachronistic, and, as I indicated earlier, certain modifications to update the statute may be entirely appropriate.

Question 2. What specific activities are currently and potentially conducted by the Department under the authority of section 5(b)?

Answer. Because of the lapse of the Export Administration Act, the export control functions of the Department, including its anti-boycott regulations, are currently conducted under the authority of Section 5(b) pursuant to Executive Order 11940, of September 30, 1976. The only other use of Section 5(b) made by the Department has been in connection with the President's direction to this Department in 1968 to establish controls over foreign direct investments. The substantive regulations implementing this program were terminated effective January 29, 1974. There are, of course, other activities the Department could potentially undertake in the future; however, no plans for additional activities presently exist.

Question 3. In what specific respects should the authority for such activities be recast as standard, nonemergency legislation? Should such authority be written into other laws or as separate legislation? What specific language is recommended?

Answer. There is a clear need for authority allowing the President to institute programs or impose controls on an emergency basis during periods of war or national emergency. There is likewise a clear need for authority for continuation of the export control program, although that authority need not necessarily be embodied in emergency legislation. Section 5(b) has served both important functions. While such authority could be recast or, to some extent, written separately in other laws, its clear presence is more important than its form.

Question 4. In what specific respects, if any, should the authority for such activities be retained as emergency legislation but amended to meet present circumstances and to conform to the provisions of the National Emergencies

Act? What specific emergency powers should be retained? Under what specific conditions and for what specific purposes should the President be authorized to declare a national emergency for the purpose of activating such powers? Should such authority be retained in the Trading With the Enemy Act, or written into other existing or new legislation?"

Answer. As I have mentioned, the principal use of Section 5(b) insofar as the Department of Commerce is concerned, has been in continuing the export control functions of the Department during periods when the legislative authority for such functions under the Export Administration Act had lapsed, and we believe this authority should be retained for such standby use unless the Congress were willing to make the Export Administration Act permanent legislation.

The Department would not object, however, to a requirement that should Section 5(b)'s authority be needed in the future in order to continue temporarily the export control program, or for other major purposes, the President must declare a new state of national emergency pursuant to the provisions of Section 201(a) of the National Emergencies Act. Other sections of the National Emergencies Act that could be made applicable to activities undertaken under the authority of Section 5(b) are those relating to reports to Congress and automatic termination absent formal renewal. As I noted earlier, consideration should be given to amending the statute to allow the President under certain conditions and pursuant to specified findings to invoke certain Section 5(b) powers in times of peace for crisis situations falling somewhat short of a "national emergency." And Congress may wish to require that action taken pursuant to a national emergency must relate to that emergency.

However, it is in our view critically important that the Section 5(b) powers and authorities resulting from the existence of declarations of national emergencies now in effect should not be terminated until satisfactory replacement authorities are in effect.

Question 5. In what specific respects, if any, should Section 5(b) be retained as part of the Trading With the Enemy Act and available only in time of declared war in conformity with the rest of the Act?

Answer. We believe that Section 5(b)'s present authority should not be limited for use only "in time of declared war." National emergencies, short of a declared war, do exist and require firm and rapid action. The authority in Section 5(b), or in other similar permanent legislation, should be available to deal with these situations. However, as I noted earlier, at least with respect to those authorities that can be exercised in non-wartime situations, the term "Trading With the Enemy Act" is a misnomer and accordingly such authorities should be separated from the rest of the statute or should be retained only in 12 U.S.C. 95a.

Mr. Chairman, with respect to H.R. 2382, the Economic War Powers Act which you have introduced, we support the views expressed by the Department of State on this proposed legislation to this Subcommittee in its hearings on April 26.

Thank you for your attention.

Mr. BRIGHAM. Thank you.

Mr. Jaffe.

STATEMENT OF IRVING JAFFE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Irving Jaffe, Deputy Assistant Attorney General, Civil Division, Department of Justice, received his B.S. degree from the College of the City of New York and his LL.B. from Fordham University School of Law. He has practiced privately in New York City and in Washington, D.C. Mr. Jaffe has served in a variety of legal positions in the Department of Justice: with the Board of Immigration Appeals as staff attorney; with the Office of Alien Property as Chief Trial Attorney, Chief, Estates and Trusts Section, and Chief, Special Litigation Section; and with the Civil Division, prior to his present position, as Special Litigation Counsel and Chief, Court of Claims Section. He is a member of the American Bar Association, the Federal Bar Association and the District of Columbia Bar Association. Mr. Jaffe has been a frequent speaker and panelist in the field of government contract law.

Mr. JAFFE. I am accompanied by Mr. Bruno Ristau, Chief of our Foreign Litigation Section in the Civil Division.

I would like, for orderliness, to have the date on my statement indicated to be May 5, 1977, which is not the date on it. It is now dated April 27.

I will try to synopsize, if I may, again in the interest of time, the statement which you have, to emphasize those points which I think are important, and have my statement as written submitted for the record.[1]

SEIZURE OF "CLOAKED" PROPERTY

Section 5(b) of the Trading With the Enemy Act, which has contained that section in its present form since the first War Powers Act of 1941, is, I submit, absolutely essential to the operation of the Trading With the Enemy Act, not only in time of war but in times of peace. The important contributions of section 5(b) are best illustrated, I think, by circumstances showing that until section 5(b) was amended it was impossible for us in time of war to seize property which was, as we referred to it, "cloaked"; that is, where enemy interests or options were concealed, and where enemy ownership or control was placed in the hands of nonenemy friends and intimates. The section 5(b), as amended, authorized us to seize the property, if necessary, of "any" foreign country or nationals thereof, which, of course, is a different term than "enemy."

The matter is illustrated, and I refer to it in my statement, by the situation that existed after the First World War, before 5(b) was amended, as it is now, where we seized the property of the Behn Meyer Co. in this country. More than 50 percent of the stock was owned by enemies. However, under the definition of "enemy" in the Trading With the Enemy Act, which has never been changed, a corporation's status was determined by either the place of incorporation or the place where it did business. Of course a corporation, wherever incorporated, if it did business with the enemy, was an enemy. Behn Meyer did not do business with the enemy, it was incorporated in some neutral country but most of the stock was owned and controlled by enemies. We were not permitted to retain that property.

That case was reviewed in the light of the 5(b) amendment of 1941 in *Clark* v. *Uebersee*, in which it was pointed out, as I set forth in my statement on page 7, that it was the notorious and accepted practice of the Germans and their allies to conceal and cloak their interests in neutral corporations. In construing the flexible powers granted under amended 5(b), and exploring the manner in which a corporation could prove that it was not enemy tainted or enemy owned, the court decided that section 5(b), as amended, the definition of "enemy" in section 2, and the provisions of section 9 were to be read as a harmonious whole. Therefore, seizure was permitted of any property interest belonging to a foreign national. Those persons who claimed to be nonenemy, could sue under 9(a) to establish, by piercing the corporate veil, if necessary, that the corporation is not tainted by concealed enemy ownership, control or other interests.

Failing to do so, that is, establish nonenemy interests, we could retain the property. That has worked very well since World War II. We need 5(b) for that purpose.

[1] Mr. Jaffe's prepared statement appears on p. 133.

FREEZING OF ASSETS

I also call to your attention the importance of having been able to impose immediately, as an emergency situation, the freezing controls which began in 1940 and which were completed in 1941, at a time when this country was at peace. We did not enter the war until December 1941.

However, it was most important in the conduct of our foreign relations to see to it that the Germans and their allies did not use property in this country belonging to countries or nationals of the countries which they overran beginning in 1939; but most importantly in 1940, when they entered Norway, Denmark and shortly thereafter, Belgium and the Netherlands. It was imperative that the assets of the nationals of those countries and of the countries themselves be frozen, not seized, but frozen immediately. Any delay would have made it possible for the Germans to have utilized those assets, if not by actual transfer, by hypothecation, or mortgaging, if you will.

So it is most important that 5(b) be returned as part of the Trading With the Enemy Act, I emphasize, as part of the Trading With the Enemy Act, even in times of peace. The Supreme Court, in *Propper* v. *Clark*, upheld the validity of the freezing done in 1941, and citing the *Salesian-American Corporation* case as to even earlier freezings, on the basis that freezing was necessary because of the imminence of the war and because of the threat of war. While I don't deny that we could have 5(b) elsewhere, perhaps as a peacetime measure, it is so much a part of the war powers that it does deserve to remain in the Trading With the Enemy Act.

It seems to me that since the section is already codified in two places, the other being section 95a of title 12, that if it is a matter of embarrassment in the field of commerce to impose peacetime controls upon friendly nationals by reference to the Trading With the Enemy Act, I suppose, that 5(b) could be given an independent status in the Banking Act; that act could then be cited by the Commerce Department or by the Treasury Department as appropriate, for other control purposes, and 5(b) would be relied upon for measures taken under the Trading With the Enemy Act, as originally intended. I am trying to say the same controls may serve two purposes. I would not want 5(b) removed from the Trading With the Enemy Act because of any alleged misnomer.

Now, with respect to the questions that you submitted, my statement does not contain any answers. We did, however, discuss with the Department of State the answers they submitted to the questions and we adopt the State Department answers to the five questions you submitted to us with the necessary exception of question 2, because that is addressed to what activities our Department is currently and potentially conducting under the authority of section 5(b).

ALIEN PROPERTY CUSTODIAN

The Attorney General was designated as successor to the Alien Property Custodian after World War II, as he was after World War I. I would assume it may be a practice—although I hope we don't have any more wars—that after the investigations and seizure work under

the Trading With the Enemy Act have been largely completed and the hostilities have ceased, the office of Alien Property Custodian will be dissolved and its functions will be turned over to the Attorney General, which usually is mostly litigation at that point.

Currently, we still have matters pending under the Trading With the Enemy Act concerning seizures made during and after World War II under the authority of section 5(b). To that extent we are still involved in actions that were taken under 5(b). We have not, since the early 1950's, invoked 5(b) in connection with any of the activities of the Department of Justice on our own.

Potentially, of course, still as successor to the Alien Property Custodian, it is conceivable we might be required to utilize some of the provisions under the act but in my view that would be remote because, as in the past, if freezing controls have to be imposed, the President has usually designated the Secretary of the Treasury to take care of that aspect of his powers, and also the licensing. We may, again as successors to the Alien Property Custodian, have powers similar to those given to the Alien Property Custodian after March 11, 1942, and be required to invoke them, but it has not happened yet. So I merely mention it as a possible potential.

Otherwise, we adopt the State Department's answers. I would indicate, too, that we believe, as does the State Department, that certain portions of the National Emergencies Act can be made applicable to national emergencies under section 5(b), even as they appear in the Trading With the Enemy Act, but only in time of peace.

I don't believe that those provisions ought to apply in time of war, but in time of peace, I think they could.

The State Department has indicated that such provisions as——

Mr. BINGHAM. Mr. Jaffe, excuse me. There is no need to repeat that. We are familiar with the State Department's testimony.

The Treasury Department gave us the most specific suggestions for amendment of section 5(b), and I presume that was an administration position. It was so stated by the representative of the State Department. I presume that you concur in those suggestions as well.

Mr. JAFFE. Well, I am not certain——

Mr. BINGHAM. I think that the Departments are not in very good liaison. Usually we do expect an administration position, and the State Department indicated that it concurred with the suggestions made by the Treasury Department.

Are you familiar with those, Mr. Moyer?

Mr. MOYER. In a general way. Most are not applicable to the Commerce Department's principal concern, thus we defer to the Treasury on the specific amendments they suggest.

ASSET CONTROLS AS COMPARED TO TRADE CONTROLS

Mr. JAFFE. We met and worked together on these issues, but what I was about to say is that there are really two aspects of this question, and the Commerce Department and the Treasury Department are addressing their remarks more to the trade aspects of the utilization of section 5(b), and I did not intend to address myself to those problems because we do not get involved in them.

My concern is that whatever may be done with respect to section 5(b) and its application to peacetime trade embargoes or trade regulations, that such changes not affect the application of 5(b) as it has been utilized under the Trading With the Enemy Act as a war measure. They are not precisely the same.

My point is that we must consider 5(b) as having perhaps a dual purpose, and one of them should not be interfered with, that is the manner in which it has been applied under the Trading With the Enemy Act with respect to enemy and foreign-owned property. This must be distinguished from section 5(b)'s utilization for imports, exports, and trade controls.

And I should say, I suppose, that we do not have any objection to controls by the Congress to the extent that the State Department indicated them and I should say, since I represent the Department of Justice here, that we do believe that the concurrent resolution device that appears in the National Emergencies Act and which is also included in the Economic Powers Act, is in my view unconstitutional.

Mr. BINGHAM. Does that conclude your statement?

Mr. JAFFE. Yes, it does.

[Mr. Jaffe's prepared statement follows:]

PREPARED STATEMENT OF IRVING JAFFE, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the Subcommittee:

I am pleased to have the opportunity to testify on H.R. 1560, a bill "to repeal Section 5(b) of the Trading With the Enemy Act of 1917." Appearing with me is Mr. Bruno A. Ristau, Chief of Foreign Litigation in the Civil Division, who, for the past decade, has handled most of the Department's civil litigation arising under the Trading With the Enemy Act.

Before I express the Justice Department's views on the bill, it may be helpful if I were to summarize for the Subcommittee the history of section 5(b), and the role which the Justice Department has played in administering Section 5(b).

Section 5(b)(1) of the Trading With the Enemy Act, as amended by Section 301 of the First War Powers Act of 1941, confers upon the Executive four major groups of powers:

(*a*) regulatory powers with respect to foreign exchange, banking transfers, coin, bullion, currency, and securities;

(*b*) regulatory powers with respect to "any property in which any foreign country or a national thereof has any interest";

(*c*) the power to vest "any property or interest of any foreign country or national thereof"; and

(*d*) the powers to hold, use, administer, liquidate, sell, or otherwise deal with "such interest or property" in the interest of and for the benefit of the United States.

The Attorney General, who in 1946 became the successor to the Alien Property Custodian, has been concerned primarily with the powers granted to the Executive in the third and fourth group of powers, namely, the powers to vest foreign property and to liquidate it for the benefit of the United States. The regulatory powers defined in the first and second groups have been historically exercised by the Department of the Treasury and, in recent years, to some extent, by the Department of Commerce. Since representatives from these two Departments, as well as the Department of State, will present the Executive Branch's views on the proposed repeal of these regulatory powers, I shall limit my discussion to the Government's seizure or vesting powers, and the impact which a repeal of Section 5(b) would have upon those Executive powers.

The Trading With the Enemy Act was enacted shortly after the entry of the United States into World War I (Act of October 6, 1917, 40 Stat. 411). It was enacted in the exercise of Congress' power "to declare war * * * and make rules concerning captures on land and water." Const., Art. I, § 8, cl. 11. See *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11 (1926). Section 5(b), as originally enacted in 1917, conferred regulatory powers over certain transac-

tions "between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries." 40 Stat. 415. By the Joint Resolution of May 7, 1940, 54 Stat. 179, it was amended to confer a broad range of regulatory powers over property "in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest." As amended, it became the basis of that extensive system of controls over foreign funds known as the "freezing program", which was being actively enforced by the Treasury Department at the time the First War Powers Act was enacted.

Freezing of foreign funds was instituted by the Treasury Department under the authority of Executive Order No. 8389 on April 10, 1940, two days after Germany's invasion of Denmark and Norway. The Order subjected to licensing controls all transactions involving funds in the United States "in which Norway or Denmark or any national thereof has * * * any interest," thereby preventing Germany from forcing the government and inhabitants of the invaded territory to transfer funds in the United States in furtherance of German interests. In brief, freezing did not change the ownership of the funds affected, but merely prohibited any transfer without a license from the Treasury and rendered any unlicensed transfer void. By the Joint Resolution of May 7, 1940, Congress ratified Executive Order No. 8389 and the regulations issued under it, and enlarged the regulatory powers conferred by Section 5(b). Under this statutory grant, the application of the freezing controls was successively extended by executive order to the property of additional foreign countries and their nationals. By July 26, 1941, thirty-two foreign countries and their nationals, comprising all of continental Europe as well as China and Japan, invaded countries, and certain neutrals, were specifically subjected to the freezing controls. (Executive Order No. 8832.)

When the First War Powers Act, 1941, was enacted, it had become notorious, in large measure as the result of discoveries made in the course of administering the pre-existing freezing controls, that the Axis countries had developed a multitude of techniques for concealing actual ownership or control by enemies of ostensibly neutral property. Real ownership was concealed by the use of nominees and by the erection of complex holding company structures, the stock of such holding companies typically being in the form of bearer shares whose ownership was exceedingly difficult to trace. And control was often divorced from ownership and exercised through options, contractual relationships, possession of vital technical information, and loyalty of key personnel. Where, as was often the case, cloaking was effected through neutral countries, the difficulties of detecting the enemy interests were accentuated by laws, of which those of Switzerland are typical, which accorded a privileged status to and prohibited the disclosure of certain kinds of banking and commercial information.

During World War I, the right to vest and retain property had depended upon establishment of enemy ownership, and "enemy" was defined in terms of citizenship, residence, and place of incorporation or doing business. (See Section 2 of the Trading With the Enemy Act.) Under these definitions, seizure of enemy-controlled property could be averted by such simple expedients as, for example, placing ownership of it in a neutral corporation 100% of the stock of which was owned by enemies. In such a case, the property would be outside the seizure powers as conferred by Section 7(c) of the original Act, because owned by a neutral, for it had been held by the courts that the corporate entity could not be disregarded even in cases of 100% stock ownership. See *Behn, Meyer & Co.* v. *Miller*, 266 U.S. 457. By extending in the First War Powers Act of 1941 the Executive's vesting powers to property "of any foreign country or national thereof" and confirming a concept of nationality determined by substantial ownership and control as well as by location, citizenship, residence, and domicile, Congress made available an instrument for cutting through any scheme by which the guise of neutrality might be used to hide enemy interest.

Congressional awareness that in a war of world-wide dimensions enemy character could not always be assumed to follow political boundaries freed the vesting power from the technical limitations of enemy status embodied in the 1917 Act. Moreover, even in the case of property in the United States owned and controlled by an alien of undoubted friendliness toward this country, Congress found it appropriate that the Executive, acting in response to the most crucial national needs, should have the power to vest any foreign-owned property to permit the affirmative use of such property by the Government for wartime purposes, protection of the constitutional rights of a friendly alien being assured by

the available remedy of suit for just compensation. There was thus every reason why Congress, legislating at the outbreak of a war whose future course was unpredictable, should have deemed it appropriate to confer upon the Executive the widest possible range of powers over all foreign property, and should have chosen, as it did, to extend the powers to vest, retain, and affirmatively use to all property which was then subject to freezing controls or which might in the future be subjected to those controls.

When the Congressional grant and the Executive exercise of these powers were challenged in the courts on constitutional grounds, the Supreme Court unanimously sustained them in 1947 in the landmark case of *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480. Said the Court (at pp. 484–486) :

"It was notorious that Germany and her allies had developed numerous techniques for concealing enemy ownership or control of property which was ostensibly friendly or neutral. They had through numerous devices, including the corporation, acquired indirect control or ownership in industries in this country for the purposes of economic warfare. Sec. 5(b) was amended on the heels of the declaration of war to cope with that problem. Congress by that amendment granted the President the power to vest in an agency designated by him 'any property or interest of any foreign country or national thereof.' The property of all foreign interests was placed within reach of the vesting power, not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts.

"Thus the President acquired new 'flexible powers' * * * to deal effectively with property interests which had either an open or concealed enemy taint."

Section 5(b) was the sole basis relied upon for the vast program conducted first by the Alien Property Custodian, and since 1946 by the Department of Justice, of vesting enemy-owned property during and after World War II. The vesting program had formally terminated by 1966 as recounted in Executive Order 11281, issued on May 13, 1966.

As a result of the vesting program, as of June 30, 1975, the cumulative cash receipts by the Office of Alien Property from enemy property amounted to $867,000,000. After deductions for administrative expenses, taxes, payment of title and debt claims, an amount of $482,250,000 was paid over to the War Claims Fund. Pursuant to Congressional direction, the fund has been used to compensate American citizen for losses suffered at the hands of the Axis Powers in World War II.

There remain in the U.S. Treasury a balance of approximately $13,000,000, and unliquidated property estimated to be worth about $1,000,000, which continues to be administered by the Office of Alien Property, which is now located in the Civil Division of the Department of Justice.

I should note in passing that assets, once vested, are administered and disposed of under other provisions of the Trading With the Enemy Act (see, e.g., Sections 6, 9, 12 and 32), not under Section 5(b).

It is the position of the Justice Department that if the Trading With the Enemy Act is to provide the Executive with any meaningful powers in any future conflict, the Act must retain as permanent legislation those provisions of Section 5(b) which grant to the President the power to vest or seize foreign-owned property, in time of war or other national need, and to utilize such property in the interest of the Nation. A repeal of Section 5(b) would eviscerate the Act and render it useless as a weapon in modern economic warfare.

Mr. Chairman, I defer to the representatives of the Departments of State, Treasury and Commerce on the effect which the repeal of Section 5(b) would have upon the conduct of the foreign policy of the United States and the regulatory powers over foreign trade and foreign property exercised by those Departments.

I also defer to the representatives of those Departments concerning the Executive Branch's views on H.R. 2382, the Economic War Powers Act. That bill proposes to limit the imposition of trade embargoes and would establish procedures by which Congress could terminate such embargoes in the future—a regulatory area not within the jurisdiction of the Department of Justice. I must, however, note—as this Subcommittee is no doubt aware—that the Executive has repeatedly expressed the view that the use of concurrent resolutions to offset Executive powers is constitutionally objectionable. This position is grounded in Article I, section 7, clauses 2 and 3 of the Constitution, which provide that every legislative act which requires the concurrence of the two Houses of Congress must be presented to the President, before it may take effect.

Thank you, Mr. Chairman.

Mr. BINGHAM. Thank you.

Mr. Moyer, I would like you to develop, if you would, some of the thoughts that you have suggested on page 8 of your testimony, particularly where you say that it might be appropriate to have a simple requirement that section 5(b) could be used if the President declared a new state of national emergency pursuant to the provisions of section 201(a) of the National Emergencies Act.

One of the problems about this whole situation is that the administration of this act really has been based on a series of fictions. The emergency under which section 5(b) is now being administered, as I understand, is the emergency declared in 1950. What sort of a definition do you suggest for a national emergency that would warrant the kind of controls that you envisage?

Mr. MOYER. I would like if I may to answer the question in two ways. It seems to me there is one response, as a legal matter, and another as a policy matter. Your question, at least to some extent, assumes that there must be a correlation between the national emergency declared and the particular controls, or action taken pursuant to 5(b). I think as a question of law that is not entirely clear, based on the case law that has been developed to date.

As a policy matter it seems to be an entirely different question.

Mr. BINGHAM. Let's address the policy question.

Mr. MOYER. As a policy question the Department of Commerce is not unreceptive to the proposal that there should be a correlation, subject to the conditions I discussed in my testimony.

Our underlying concern is that there exist sufficient authority for the President and the Department of Commerce to take certain types of emergency action. The most immediate example we have is the Export Administration Act.

Mr. BINGHAM. Let me interrupt you there to comment that you place a great deal of stress on the fact that it was nice to have section 5(b) in place so that it didn't matter whether the Export Administration Act expired, which has happened several times. But other important legislation does not have that kind of backup, and I would suggest to you that if 5(b) had not been in place a way would have been found to continue the Export Administration Act. That is done with other legislation through short term extensions, or other ways can be found. One of the reasons why the Export Administration Act has been allowed to expire so many times is because there was this backup legislation, so the administration had no incentive to press for an extension of the Export Administration Act. That was the case, in my judgment, last fall.

Mr. MOYER. I don't necessarily disagree with that. It seems to me the availability of backup legislation creates a certain kind of leverage in the same way the absence of it might generate a different kind of leverage. I would focus not on that issue so much as what I think is an agreed point of the desirability, at least in the case of the Export Administration Act, of some action to make that legislation permanent.

Mr. BINGHAM. On that point let me say that isn't really before us at this time. That would logically have been included in the extension of the Export Administration Act, which, as you realize, has now

passed the House and, for reasons which seemed sufficient to the full committee, was extended for just 2 years.

Don't you feel as a matter of policy that we should distinguish between three different situations: A situation where we are at war or war is imminent, which Mr. Jaffe was talking about; a situation of a genuine national emergency, and when the 1950 proclamation was made I would concede that was a genuine national emergency; and a situation such as we have today where we are confronted with a continuing kind of problem with the Communist world, but unless you define emergency in some rather unusual way it can't very well be considered a real emergency because it has become the normal situation.

Now I am not suggesting that certain types of controls aren't needed in the last type of situation. I think they are. But shouldn't we have legislation that deals specifically with those different types of situations?

Mr. MOYER. I think those are entirely appropriate distinctions to draw. Whether they should be embodied in separate pieces of legislation is an issue on which the Commerce Department is committed, simply because most of the situations in which we deal with 5(b) are non-war-time situations, and principally have come up in, I would suggest, your second example. I think the distinctions are indeed appropriate, and more important to the Commerce Department than whether those separate authorities are in different statutes, is the clear existence of at least appropriately drawn authorities covering categories 2 and 3, which you mentioned.

CONSTITUTIONALITY OF NONWARTIME BLOCKING OF ASSETS

Mr. BINGHAM. Mr. Jaffe, let me ask you this question. I think it was the Treasury Department representative the other day who suggested there was a serious question as to the constitutionality of legislation providing for the President to have the power to block the assets or freeze the assets of foreign nationals or of foreign countries, if it were not based on a situation of war or national emergency. Do you concur in that?

Mr. JAFFE. I follow the question. I of course have no doubt that in time of war there is no constitutional challenge.

Mr. BINGHAM. That is agreed. It is also agreed about the national emergency. What if there is neither war nor national emergency? Can the Congress enact legislation to give the President power to freeze the assets of foreign nationals?

Mr. JAFFE. I would, of course, want to research that a little bit but my reaction would be that you could give the President that authority without the declaration of a national emergency.

Mr. BINGHAM. We would appreciate it if you would research that and give us your considered judgment because, frankly, I think that is the way we should go so we don't have to depend on this situation of an emergency where no emergency exists.

I think, speaking for myself, that the President probably should have that authority in certain situations. I am not suggesting, for example, that Cuban assets be unblocked, even though I think the trade embargo against Cuba should be lifted, because I can see certain rea-

sons for holding on to Cuban assets as long as we are negotiating for settlement of claims.

Mr. JAFFE. We may be talking semantically, because I am certain Congress would want to specify circumstances and conditions under which he could exercise those powers. That might be another way of saying Congress has defined the emergency. There is no definition of emergency. It may be the conditions under which he could invoke those powers in peacetime is the definition of an emergency.

Mr. BINGHAM. That is so circular.

Mr. JAFFE. That is what I am trying to say.

Mr. BINGHAM. I would like you to give that more thought because I really think this may be a troublesome point in the legislation that we intend to draft.

[The information follows:]

U.S. DEPARTMENT OF JUSTICE,
Washington, D.C., May 27, 1977.

HON. JONATHAN B. BINGHAM,
Chairman, Subcommittee on International Economic Policy and Trade, Committee on International Relations, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN BINGHAM: At the end of my testimony on May 5, 1977 relating to the proposed repeal of Section 5(b) of the Trading with the Enemy Act, you inquired whether a declaration of a national emergency was required before the Executive could take action to meet threats to the national security, national economy or the international financial system.

Our examination of the question leads us to conclude that a formal declaration of an "emergency" is not required. An emergency does not create power; it only furnishes the occasion for the exercise of power. As the Supreme Court said, "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of living power already enjoyed." *Wilson* v. *New York*, 243 U.S. 332, 348 (1917).

Although courts do, of course, take cognizance of declarations of national emergencies when the President acts pursuant to congressional authorization specifically limited to periods of national emergency, the reasonableness and validity of the powers exercised by the President are invariably judged in the light of the circumstances giving rise to the use of these powers, and not merely on the basis that the action taken was at a time when a national emergency was declared to be in existence. See, e.g., *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111–2 (C.A. 2 1965); *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833, 846 (C.A.D.C. 1970).

Congress may specify conditions under which the President may exercise certain extraordinary powers, and the President may, upon a finding that such conditions exist, exercise such powers, without the use of the term "emergency" by Congress or by the President. Numerous examples of the use of specified powers under extraordinary circumstances are catalogued in Mr. Justice Frankfurter's concurring opinion in the *Steel Seizure* case, 343 U.S. 579, 615–619 (1952). See also the provisions of the Economic Stabilization Act of 1970, 12 U.S.C. 1904, note.

Alternately, should the Congress not wish to specify conditions, Congress may authorize the President to exercise certain powers whenever the President deems it necessary to do so in the national interest or in the conduct of the government's foreign affairs. Congress has done so since the earliest days of the Republic, again without using the term "emergency". See, e.g., the act of June 4, 1794, 1 Stat. 372, which broadly authorized the President "to lay, regulate and revoke Embargoes . . . under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper." In our view, such action is constitutionally unobjectionable.

Sincerely yours,

IRVING JAFFE,
Deputy Assistant Attorney General,
Civil Division.

Mr. BINGHAM. Mr. Moyer.

Mr. MOYER. The Department of Commerce would defer to Justice Department on this constitutional issue. I would only add that as I read the opinion of Justice Jackson in the *Steel Seizure* case which I think has come to be regarded as perhaps closest to the sense of the Court, that the question of the President's constitutional authority is not unrelated to the type of action that the Congress takes with respect to a particular type of delegation of authority. That is, legislative action that the Congress takes could affect the scope of the inherent constitutional powers of the President.

Mr. BINGHAM. Mr. Fowler.

Mr. FOWLER. No questions, Mr. Chairman.

Mr. BINGHAM. Thank you, gentlemen.

We do have another vote.

As I indicated at the beginning, we plan to proceed to draft some legislation, and we will certainly take into account the interests of the various departments. I don't think we have any basic disagreements as to what the executive branch should be in a position to do, but we are trying to develop a logical structure to what has, to say the very least, become an illogical and Alice-in-Wonderland situation.

Thank you very much for your patience.

Mr. JAFFE. The Department of Justice will be happy to cooperate with the staff to any extent we can in those efforts.

Mr. MOYER. As will the Department of Commerce.

Mr. BINGHAM. Thank you, gentlemen.

The hearing stands adjourned.

[Whereupon, at 4:40 p.m. the subcommittee adjourned, subject to the call of the Chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

Markup of Trading With the Enemy Reform Legislation

THURSDAY, JUNE 2, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met in open markup session at 2:15 p.m., in room 2200, Rayburn House Office Building, Hon. Jonathan Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The Subcommittee on International Economic Policy and Trade will be in order.

Today we are to begin markup of the proposed legislation to revise section 5(b) of the Trading With the Enemy Act, which delegates certain authorities to the President to regulate financial transactions in times of war and national emergency.

The subcommittee has held hearings on section 5(b). The recommendations of the Committee on International Relations with respect to any changes that may be needed in section 5(b) or the exercise of 5(b) authorities is mandated by section 502(b) of the National Emergencies Act.

I would like to note that I have received a number of documents relating to this legislation, which I believe should be included in the report. These documents are:

An article by Stanley L. Sommerfield entitled, "Treasury Regulation of Foreign Assets and Trade;"

A memorandum dated January 24, 1977, from the American Law Division of the Congressional Research Service on "Repeal of Section 5(b) of the Trading With the Enemy Act";

A letter and enclosure from Arthur F. Burns, Chairman, Federal Reserve Board, commenting on H.R. 1560, dated May 4, 1977;

A statement dated May 13, 1977, by John E. Clute, president of the Shanghai Power Co., concerning H.R. 1560;

A letter dated May 10, 1977, from Hon. Julius L. Katz, Assistant Secretary of State for Economic and Business Affairs, containing administration comments on proposals made by public witnesses before this subcommittee; and

A memorandum dated March 9, 1977, from the American Express Co. on "Trading With the Enemy Act—Experience of the American Express Co."

89-711—77——10

If there is no objection, I would like these documents to be included in the record, subject to obtaining necessary permission and copyright waivers.[1]

The subcommittee has before it two drafts of legislation, one prepared by the subcommittee staff, and the other by the administration.

Since we do not have a quorum, and since this is unfamiliar material, it is my thought that we devote this afternoon's session to a discussion of these drafts with the subcommittee staff and with legislative counsel, representatives of the Congressional Research Service and of the administration, and that we not take any formal action on either of these drafts today.

I have scheduled further markup sessions for Monday and Tuesday of next week at 2 p.m.

I would like to start, if it is all right with you, Mr. Whalen, by asking the subcommittee staff director, Roger Majak, to identify the people at the witness table who will be available to assist in answering any questions that we may have in the course of the markup. Then he will briefly explain the staff draft, after which we can have some discussion about the differences between the staff draft and the administration draft, and try to resolve any questions that may arise.

If you would proceed, Mr. Majak.

Mr. MAJAK. At my left is William Mohrman, assistant counsel, Office of the Legislative Counsel, who is well known to us and works closely with our committee, and worked closely with the staff on the preparation of the subcommittee draft.

At my right is Mr. Leonard E. Santos, who is attorney adviser in the Office of the General Counsel, Department of the Treasury. Mr. Santos specializes in the international affairs area. He will represent the views of the several concerned agencies of the executive branch.

At his right is Mr. Raymond J. Celada, senior specialist in American Public Law, Congressional Research Service. Mr. Celada, among other things, has prepared for the staff and the members of the committee a rather detailed background memorandum on the Trading With the Enemy Act, focusing on judicial interpretations of the act and related statutory authorities. He is especially prepared to answer any questions that might arise in those areas.

I would mention as well that seated somewhere behind Mr. Santos are representatives of other executive agencies, including Mr. William Root of the Department of State; Mr. John Crook of the Department of State; Mr. Melvin Schwechter of the Department of Commerce; and Mr. Jack Goldklang of the Department of Justice.

[1] These documents appear in the appendixes.

In addition to the two drafts of legislation which you have mentioned and which are in your folders, I would simply point out some other materials that may be helpful to the subcommittee in this markup process, which we included. One is a very brief summary of the various recommendations that were made by witnesses in the course of our hearings, for quick reference. Another is a chart showing along the left margin the various specific authorities presently contained in section 5(b) of the Trading With the Enemy Act, and on the horizontal various situations or procedures under which these authorities might be used. We provide that chart, again, simply for quick reference to the authorities that we will be discussing in the course of the markup.

Finally, there are copies of several statutes relevant to our discussion of the Trading With the Enemy Act itself, the National Emergency Act, and the War Powers Resolution, for your reference.

Mr. Chairman, both the administration bill and the staff draft bill attempt to translate into legislative language a number of recommendations made by the administration and other witnesses in the course of our hearings. I would point out that they differ fundamentally in form in that the staff draft is formulated as amendments to the existing section 5(b) of the Trading With the Enemy Act, whereas the administration bill is drafted as a proposed new, free standing act, which would substitute for or supplement the current section 5(b).

As we understand the administration position, they prefer a free standing act in order to leave intact the language and history as well as the judicial interpretation of section 5(b), particularly with respect to its use in wartime.

They would, therefore, put into a proposed separate new act all of the authorities available in time of national emergency.

The subcommittee staff, on the other hand, feels that certain revisions must be made, in any event, in the wartime aspects of section 5(b). In addition, we have proposed linking the use of section 5(b) powers under certain circumstances to the procedures spelled out in the War Powers Resolution. We are less concerned than the administration about preserving the judicial interpretation of section 5(b) for these various reasons; we, therefore, formulated our draft as revising amendments to section 5(b).

I would emphasize that as a result of a meeting yesterday with administration officials, at the staff level, we identified a number of specific aspects which may require revision, in the staff draft that you have before you, as well as the administration draft to the extent that the subcommittee devotes its attention to that draft.

You will undoubtedly notice a number of those areas in reviewing the drafts. We are working on those areas, and hope to have some written suggestions for amendments to the staff draft prepared for the subcommittee for its markup session next week.

For purposes of reviewing the issues involved in this legislation, I would propose briefly to describe and comment on the specific provisions of the staff draft.

Section 1 of the staff draft, pages 1 and 2, would limit the transactions in which there is a foreign interest. The President's authority to control financial transactions, as presently written, section 5(b)(1)(A) permits regulation, in some cases, of purely domestic transactions, that is, transactions which do not involve any foreign interest.

Section (1) would also limit to times of war the President's powers to vest foreign property and to regulate the use of gold, silver and bullion. Those provisions generally conform with those suggested by the administration.

Mr. BINGHAM. If I may just interrupt a moment, and say that the staff draft is the one dated May 27. It states Discussion Draft at the top. The administration draft is dated May 28, 1977, and it states: "Administration bill submitted informally."

Mr. WHALEN. There are section-by-section summaries, both of which are dated May 26, which are used as a guide. Are they both the same?

Mr. MAJAK. Section 2 sets up new procedures for the use of Trading With the Enemy Act powers.

Mr. BINGHAM. May I interrupt you there again for a minute.

I think that it should be pointed out that the draft section (1) does leave in the authority with respect to domestic economic transactions that now exist in the Trading With the Enemy Act in wartime.

Mr. MAJAK. That is correct.

Mr. BINGHAM. I might point out to the subcommittee that I think we ought to perhaps defer discussion of any of these issues until we have the whole outline, but this is the kind of situation which makes me personally rather inclined to the administration approach that we leave the Trading With the Enemy Act more or less as it is, but limited to wartime, defined as declared war, and that we write a new act which would be called International Emergency Economic Powers Act, or something of this sort.

As you will notice as we go through here a number of the provisions of the staff draft do except wartime, and thus leave Trading With the Enemy Act more or less as is for purposes of wartime.

Mr. MAJAK. Section (2) of the draft, as I mentioned, sets up new procedures for the use of the authorities. First it defines time of war, a phrase used in section 5(b) but not precisely defined in the act. There are definitions in section (2) of the existing Trading With the Enemy Act which define beginning of war and end of war, presumably the time of war is the period of time between those two. However, we felt, for a number of reasons, that it is better to place the definition actually in section 5(b).

In addition, the existing definition does not contemplate or refer to the possibility of the termination of war by act of Congress, which we do spell out in the staff draft definition.

As recommended by virtually all of the witnesses that appeared in the subcommittee's hearings, section (2) of the staff proposal, that is on page 4, letter D, requires a separate declaration of national emergency for each application of 5(b) powers, and limits the use of those powers to that particular emergency, by making those particular authorities subject to the procedures in terms of the National Emergencies Act.

In cases where the transaction control authorities of the Trading With the Enemy Act might be used in conjunction with the introduction of U.S. troops in hostilities abroad as defined by the War Powers Resolution, the staff draft, at page 3, subparagraph C, proposes to make the use of these financial transaction authorities subject to the same procedural limits as would apply under the War Powers Resolution, namely, termination at any time by Congress and automatic termination after a maximum of 90 days unless war is declared, or Congress authorizes an extension.

Mr. BINGHAM. May I ask, at this point, is it your intention that that type of situation where hostilities exist, or where there is no declaration of war, would make possible the full exercise of the powers, that you propose leaving to the Executive in time of declared war?

Mr. MAJAK. Anything that is limited to time of war would not be applicable in times of hostility. Still the scope of authorities is quite broad for hostilities. In other words, we would not contemplate that the vesting of foreign property, which we reserve for wartime situations, would be available under circumstances of hostilities.

Mr. BINGHAM. You mean that we have in effect three types of powers, three different sets of powers, one for wartime, one for hostilities, and another for emergencies which do not involve hostilities?

Mr. MAJAK. Essentially, although the authorities available under emergencies and those authorities available under hostilities are virtually the same. The reason for the distinction is that the procedural limitations of the War Powers Resolution are more stringent than those of the National Emergencies Act, and we felt that it would be appropriate if those would apply when there are hostilities going on. But there is no difference in the authorities available.

Mr. WHALEN. Under the War Powers Resolution, if the Congress fails to act, then those authorities cease. Do the so-called emergency authorities also cease at that point?

Mr. MAJAK. Presumably, they would.

Mr. WHALEN. Could they be reinvoked, as Mr. Bingham said, under the third category?

Mr. MAJAK. That is correct.

Mr. WHALEN. But any authority would cease to exist.

Mr. MAJAK. That is correct.

Mr. WHALEN. The administration bill, I don't recall how it provides for—maybe we had better get to that later.

Mr. MAJAK. I would point out, since I have discussed already the war powers, that the administration draft makes no linkage to the War Powers Resolution, and only a partial linkage to the National Emergencies Act. I think that Mr. Santos could go into that in further detail, if you have questions about it.

Finally, section (2) of the staff proposal, at page 3, attempts to narrow 5(b) authorities in national emergencies to the control of truly international transactions in response to foreign threats.

As the subcommittee will recall, the existing language of 5(b) has been interpreted on occasion in the past to permit the imposition of essentially domestic financial controls in response to largely domestic crises.

Mr. BINGHAM. Probably the most prominent is the banking emergency under President Roosevelt in 1933 or 1934, which was essentially domestic. Wasn't the act also used by President Truman in seizure of the steel?

Mr. MAJAK. The national emergency was a strike, I believe.

STATEMENT OF RAYMOND J. CELADA, SENIOR SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Mr. CELADA. What the chairman is referring to is the case in Youngstown where the administration had no statute, and that is why he invoked the article II powers, Mr. Chairman. The court held that in the absence of a statute, nothing in the Chief Executive powers gave him authority, consequently his action in ordering the Secretary of Commerce to run the mills was unauthorized.

Mr. BINGHAM. This is an informal hearing, and we are not following regular procedures, but we are making a transcript and it is important that just one person speak at a time.

STATEMENT OF JACK GOLDKLANG, ATTORNEY ADVISER, DEPARTMENT OF JUSTICE

Mr. GOLDKLANG. I wanted to point out that it was no accident that this was used for domestic purposes by President Roosevelt in 1933. Congress specifically, in 1933, recodified section 5(b) as the Emergency Banking Act of 1933, and specifically amended it to authorize the declaration of a bank holiday, and take other actions which were at that time necessary. That is why we do have this language in the act which authorizes control of domestic transactions.

Mr. MAJAK. In our proposal, we are giving the act a more clearly international character. The staff draft also, in effect, would attempt for the first time to define more precisely what would constitute an international emergency for the purpose of this act.

The language at the bottom of the page, lines 16 and 17:

To deal with any extraordinary threat which has its source outside the United States, to the national security policy or economy of the United States.

Mr. BINGHAM. May I make a comment there. I think members of the committee will want to recognize that not only are there good substantive reasons to limit this to threats from outside the United States, but also if we were to stray beyond that, we would be stretching the jurisdiction of the committee, since the jurisdiction of the committee is specifically the Trading With the Enemy Act.

In a broader sense, we are dealing with international problems.

Mr. WHALEN. Of course, the term "threat" could be construed to mean some adverse situation created by some friendly nation, could it not?

Mr. MAJAK. Yes; I would certainly think so.

Mr. WHALEN. President Nixon used section 5(b) in connection with part of the economic program back in 1971.

Mr. MAJAK. Yes.

Mr. WHALEN. Could that be utilized again? In such actions as Mr. Nixon took in 1971, could that be utilized again by the President under the provisions of this language?

Mr. MAJAK. Under the staff's description of what would constitute a national emergency, unless the President could make the case that it was from a foreign source, he would not have these authorities available. He would not be able to invoke those authorities.

Mr. WHALEN. As I recall what was happening, money conversions, I think, were draining——

Mr. MAJAK. That was our own doing, I think, but nevertheless it came from abroad.

STATEMENT OF LEONARD E. SANTOS, ATTORNEY ADVISER, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Mr. SANTOS. Mr. Chairman, I wanted to make a point. We will be commenting more fully on these points later on, but on this particular point we are concerned that this language would not cover most situations which 5(b) has been used for, all legitimately of a mixed nature. They involved international, perhaps foreign sources but they affected the domestic situation. Obviously, there is an interplay between the two. We would like to see that language modified to make sure that it is clear that it covers mixed situations. There are very few situations that are exclusively foreign in origin.

Mr. GOLDKLANG. To follow up on what happened in 1971, President Nixon did, in fact, declare a national emergency and call upon the country to help him in strengthening the international economic position of the United States. Subsequently, the courts did uphold his use of that declaration. The court said the important surcharge levied at that time was authorized by the act.

Mr. SANTOS. He did not refer to section 5(b). It was after the fact.

Mr. MAJAK. There is a clear need to grandfather or deal in some special way with existing uses of section 5(b) authorities so as not to interfere with outstanding financial claims growing out of these controls, and other ongoing uses of the act.

The current uses which the staff draft grandfathers on page 4, paragraph (e), are the uses of 5(b) transaction controls to implement our current trade embargoes against Vietnam, Cuba, North Korea, and to control foreign assets in certain places like the People's Republic of China, Czechoslovakia, and others, with which we have not settled certain financial claims.

The staff draft would make no change in the status of those claims, or any of the authorities currently exercised under 5(b). It would permit them to continue to be used as long as the President determines it is necessary to do so.

The staff draft at page 5 would preclude the use of the authority of 5(b) to interfere with certain first amendment activities of Americans, including personal communication, collection, and distribution of news by the press, the making of charitable contributions, and transaction controls in effect now and used in the past.

The subcommittee has heard the testimony to the effect that in accepted times of war, such transactions should not interfere with these kinds of activities.

Mr. WHALEN. Are there any such prohibitions that exist now?

Mr. MAJAK. No explicitly. In the case of the Vietnam embargo, the financial controls did make delivery of mail difficult to Vietnam.

Mr. WHALEN. I am surprised to see charitable contributions included there. Is that in juxtaposition and used elsewhere?

Mr. MAJAK. That is new construction by the staff. As you will recall, there is provision in the Trading With the Enemy Act for a certain amount of humanitarian transactions to take place. It is actually spelled out to some extent in the act.

Humanitarian, however, is a word that is difficult to interpret. We have tried to devise a phrase which would not require a judgment about the purpose of the transaction, but only its nature. We would visualize that the term "charitable contribution" would mean any transfer of assets for which there was not compensation. It only deals with the nature of the transaction, and not its purpose.

Certainly, this is a phrase that we would want to consider carefully as to whether it is too broad or too narrow. However, it is simply to try to get away from the current exemption for humanitarian transactions which has not proved entirely satisfactory.

Mr. BINGHAM. We might consider whether to use some cross-reference to the internal revenue code as far as definition is concerned.

I think that we had better suspend at this point since we have a recorded vote on the floor.

[Temporary recess.]

Mr. BINGHAM. The subcommittee will resume.

Mr. MAJAK. The staff draft at pages 5 and 6 would require the President to consult with Congress, whenever possible, on the uses of 5(b) authorities and require detailed periodic reports to the Congress on the uses of these powers, in addition to those which might be required under the War Powers Resolution or the National Emergencies Act, where applicable.

Section 3 of the staff proposal, at page 7, attempts to clean up certain existing language in 5(b), which is rather unclear, and which would seem to invite extensive interpretations of the powers conferred by the act. It would also remove from 5(b) the explicit authority of the President to redefine the terms of the act. The intent here is not to preclude the President from issuing necessary rules and regulations, including definitions of terms necessary to implement the act. Indeed that authority already exists in other places in the act.

For example, section 5 of the existing Trading With the Enemy Act, the intent of the staff is to remove the specific invitation to define terms which might contribute to uses of the act beyond what was envisioned by Congress.

The staff draft in section (4) at page 7 reflects an administration recommendation to increase existing criminal penalties for a violation of section 5(b) to $50,000, the same level as is already contained, if you will recall, in the Export Administration Act.

Mr. BINGHAM. That is for a willful violation?

Mr. SANTOS. Yes.

Mr. MAJAK. So penalties are provided for the first time, and are at the same level as those provided in the Export Administration Act.

In section 5 we propose to change the name of the act to more closely reflect its purposes, and to get away from the diplomatic problems involved in seeming to name foreign nations as an enemy under circumstances other than wartime.

Section 6 responds to the administration request that the Congress transfer to the Export Administration Act the authority to extend controls on exports of certain items. Such authority is not contained explicitly in the Export Administration Act, but it is contained in the current version of 5(b). Section 5(b), therefore, has been relied upon to provide this authority which has been needed to control, for example, the export of military or strategic items from foreign locations by persons who might be subject to U.S. jurisdiction.

Mr. BINGHAM. We did not make that change in the recent revision?

Mr. MAJAK. We did not; as far as I recall, it was not proposed, although I may be in error. We could look at the record of the Export Administration Act here. It has been drawn to our attention as a problem.

The staff generally agrees with the administration that this authority belongs in the statute governing export controls rather than section 5(b), which deals with financial transaction controls.

Finally, Mr. Chairman,——

Mr. BINGHAM. Excuse me, but is there a reason why we cannot include in this bill an amendment to the Export Administration Act?

Mr. MAJAK. I don't see any reason why we can't amend this act and the Export Administration Act which are both under the jurisdiction of this subcommittee.

Section 7 at pages 8 and 9 proposes certain findings of policy with respect to the use of transaction control authority to effect total trade embargoes. The subcommittee will recall that section 5(b) is currently used in conjunction with the Export Administration Act to achieve total trade embargoes. Several witnesses suggested that more precise policy guidelines are needed from Congress with respect to the circumstances under which such embargoes should be used.

Section 7 suggests a finding that unilateral trade embargoes are generally ineffective and inconsistent with certain international commitments of the United States and suggests that total embargoes should only be used multilaterally, that is in conjunction with other nations, through multilateral decisions.

Section 7 also would prohibit the use of transaction controls to conduct unilateral, secondary or tertiary boycott or embargoes. The United States, in fact, is only rarely, and in quite limited ways, engaged in such embargoes. This language would reaffirm the U.S. practice to refrain from extending total trade embargoes beyond the primary level.

The subcommittee should note that section 7 is not intended to affect our program of export controls on certain items for purposes of national security. Those controls do not constitute a total embargo since they are limited to military and strategic items. They are authorized in separate legislation, namely, the Export Administration Act, the Battle Act, and other statutes. Generally, they do not involve transaction controls, simply export controls.

Mr. Chairman, that concludes my brief review of the proposed staff draft, and we will be glad to answer questions on that proposal or other materials before the subcommittee.

Mr. BINGHAM. I think that it would be appropriate, at this time, to hear from Mr. Santos, both with respect to the administration bill and what other comments he may care to make about the staff draft.

Mr. SANTOS. I appreciate it, Mr. Chairman.

I would like to preface my comments with the general statement that the administration bill that you have received and that you have before you, while it does represent the coordinated work of the four agencies involved, it was not cleared in the final sense before it was sent to you. It is very much what we call a technical drafting aid.

At any rate, we don't wish to characterize it as a final administration bill.

The other thing that I would say is that given the shortness of time which we have had to discuss the staff's draft, we have not been able to present to you today a final administration position in any way, but we again offer these comments as the thoughts of the four agencies, but not necessarily cleared in the normal process that they would be cleared.

I would like to start off by addressing some of the points that were raised by Mr. Majak's discussion, and then I will be happy to address others.

We have drafted a separate bill primarily for aesthetic reasons. We think that it is a much neater way to provide for emergency authorities, which is the primary concern of the committee, leaving the war powers essentially intact.

Our other reason is those powers have been interpreted judicially. But the primary one, I think, was that we are providing for two separate circumstances, and that is appropriately treated in two separate statutes.

That is our preference, but we, again, are not bent on that, if the committee wishes to approach it in a different way.

You mentioned, I think the staff committee draft would have left intact war powers to control domestic banking transactions. In other words, I think you have the impression that domestic banking transactions may still be regulated by the staff committee draft in wartime, but not in national emergencies.

I think that what is the language of 5(b)(1)(A) clearly prevents the regulation of transactions in foreign exchanges, banking transactions and so on, if there is no foreign national interest or foreign country interest, whether it is wartime or a national emergency.

The words in parentheses are not restricted to emergency situations. They modify the prior times without any qualifications. The qualifications for wartime powers would be the power to investigate, regulate, et cetera, the importing or exporting of currency and securities.

Mr. BINGHAM. Is that another reason, perhaps, for having the structure that you suggest having—the Trading With the Enemy Act, giving it powers to deal with wartime situations, and then having a separate statute or title to deal with the other types of situations?

Mr. SANTOS. We do not wish to say that the administration is bent on one procedure more than the other. It seems to us that it is a little bit cumbersome in section 5(b) to start making exceptions in case of war, in another case for armed hostilities, et cetera.

Mr. BINGHAM. Frankly, it strikes me that it would be easier to understand and less confusing to do it that way. I had not thought of the argument which you mentioned, where you have a long history of judicial interpretation. This is one thing that I would like to leave more or less intact.

It seems to me that it would be clearer. Just by way of a suggestion, let me suggest that we could start with title I, which would be an amendment to the Trading With the Enemy Act, making such exclusions and changes as you wish to make. It would be the neatest approach.

Title I would be the amendments to the Trading With the Enemy Act; title II would then set up a new International Economic Emergencies Act, whatever you would want to call it. Then you could have a separate title to deal with these amendments to the Export Administration Act, which really belong under a separate title, it seems to me.

How does that strike you?

Mr. SANTOS. It sounds good to me. It is more or less what we have done. We have taken the new act, and then 5(b).

Mr. WHALEN. Is there any reason for that?

Mr. SANTOS. I don't think that we have any preference.

Mr. BINGHAM. I have in the back of my mind the consideration about the jurisdiction of this subcommittee, which specifies that we have jurisdiction over the Trading With the Enemy Act. We should start with that. I believe your bill is entitled that way, and there is no question that it is within our jurisdiction.

In any event——

Mr. MAJAK. I presume that the subcommittee knows that in the administration bill, it was the only change made in the Trading With the Enemy Act, the deletion of the national emergency authority.

Mr. BINGHAM. I would favor some of those changes, just in terms of the order in which we deal with the problem in our bill. Let us assume that this is what we will do, just as a matter of format.

Now, would you proceed with your explanation?

Mr. SANTOS. I will be happy to, Mr. Chairman.

Just as a matter of comment on one of the statements made earlier that the words "charitable contributions" might be tied to the meaning contained in the Internal Revenue Code. We have serious doubts about the use of charitable contributions in any event, but I would just point out that I think the Internal Revenue Code, section 501(c)(3), defines charitable contributions in a rather special way, which would never be applicable to foreign countries with which we have no relations.

So I am not sure of that term as defined by the Internal Revenue Code would fulfill the committee's desire in any event.

Let me turn to the bill that the administration has proposed, or I should say, has drafted and given to you. As you know, separate emergency powers are provided in the new act. Those powers are essentially the ones that are contained in section 5(b) in wartime, with exceptions.

In the first instance, it deletes the power to regulate those securities, bullion, et cetera, simply because in the 1974 law that was passed permits Americans to hold gold. I am not sure that there is any purpose in retaining that power.

Arguably, there is also no reason for retaining that power in wartime, but we have not deleted that power in wartime, only in the case of national emergencies.

The power to vest in nonwartime, which currently is in section 5(b) has been deleted from our draft. The power to vest property after the seizure of property in a nonwartime situation has been deleted.

Mr. BINGHAM. Do you want to use a common word for vest?

Mr. SANTOS. It would be to acquire title, which as I said would still remain in wartime. Other than that, section 5(b)(1) remains essentially the same as it is, in wartime. We have added a $10,000 civil penalty as the staff has done, and have increased the criminal penalty from $10,000 to $50,000.

In section 103 of the draft, I believe that it is page 3 of our draft, we have placed the powers that are used in a national emergency under the general procedural constraints of the National Emergencies Act with the primary exception of a concurrent resolution, or so-called legislative veto mechanism, and also the automatic 2-year expiration that is provided at the outset of the National Emergencies Act.

We have also grandfathered in existing uses of the section. We have a provision in here that requires that a new national emergency be declared when it is used for any circumstance.

Mr. BINGHAM. Just a minute. It occurs to me that members of the committee may not be familiar with the National Emergencies Act.

Do you want to, quickly, Mr. Majak, give us a brief summary of that, its history and what it is?

Mr. MAJAK. Its history, I believe, goes back to an effort by Senators Church and Mathias back in the seventies to review the various authorities that are exercised in terms of national emergency.

As you may recall there was a select or special committee in the Senate that spent several years researching the various statutes that are triggered by national emergencies on the basis of the National Emergencies Act.

I think that they eventually came up with 400 or 500 statutes, many of which were no longer in use but nevertheless were theoretically triggered by Presidential declaration of national emergency.

As a result of that investigation and more years of work, legislation was passed last year, as I recall, about September of 1976, and this was the National Emergencies Act. You have a copy of the act in your files as well as a summary.

Generally, it begins by terminating 2 years after enactment—it would mean September of 1978, roughly—the existing authorities pursuant to national emergencies that were in effect.

It goes on, then, to spell out procedures for any future declarations of national emergencies, and the authority to be exercised pursuant to such national emergencies. The primary elements of those procedures are a provision that when a national emergency is declared, the Congress may terminate the emergency and the authorities pursuant thereto at any time by concurrent resolution, and in any case must review the national emergency periodically every 6 months.

Finally the national emergency must be extended annually by the President, if he elects to do so. So there is a mechanism for fairly constant review of the emergency itself, and the authorities that are being used on that basis.

That generally does it.

Mr. BINGHAM. We want to refer to the exceptions.

Mr. MAJAK. Finally, there were a number of statutory provisions exempted from the National Emergencies Act, one of them being section 5(b) of the Trading With the Enemy Act. The Congress is mandated to make recommendations with respect to what to do with these statutes in a period of 9 months, which is now approaching.

Mr. BINGHAM. I have a couple of specific questions about it. What committee handled the National Emergencies Act?

Mr. MAJAK. The Judiciary Committee.

Mr. BINGHAM. What committee is charged with these other acts that have to be acted on by June 15?

Mr. MAJAK. I have not recently reviewed all of those. I think that some of them come under the Judiciary Committee. As far as I know, this is the only one over which we have jurisdiction.

Mr. WHALEN. The first title on page 1 of the administration bill, the Emergency Economic Powers Act.

Mr. BINGHAM. It would be wise if that should be title II, and I would suggest inserting the word "international" there. This act may be entitled as the International Emergency Economic Powers Act of 1977.

Mr. Santos, our concern is to limit it to our subcommittee's jurisdiction, and that we may deny you powers which you would like to have.

Mr. SANTOS. We certainly understand your jurisdictional problem. I am not sure that we would be happy at the prospect of losing powers simply for jurisdictional problems. If you have some other reason for deleting this power, I would be interested in hearing about.

Mr. BINGHAM. The sense would be the same.

Mr. SANTOS. I am afraid that it might not. To give you an example, if, for instance, the power under section 5(b) can only be exercised if there is a foreign national interest——

Mr. BINGHAM. We are leaving 5(b) as is.

Mr. SANTOS. That is a wartime statute.

Mr. WHALEN. You use 5(b), and in other words there would not always be an international involvement. What you are suggesting is, under very limited procedures, you would like to have that authority.

Mr. SANTOS. As Mr. Goldklang stated, Congress specifically wished to have it used in a situation which did not involve international banking controls. All of these Executive actions, during the 1933 banking crisis, received, congressional ratification. The Emergency Banking Act was passed to ratify actions specifically taken under section 5(b). At the time that that action was taken 5(b) did not include the power to regulate domestic banking. It was added by Congress specifically to authorize it.

Mr. WHALEN. It was added in a separate act.

Mr. SANTOS. Section 5(b) was amended at that time to include the language you now see in section 5(b). Subsequently the section was amended again. But the language with respect to domestic banking transactions was added in 1933.

Mr. BINGHAM. It was after the fact.

Mr. SANTOS. Subsequently, credit controls were applied under that language, and the gold regulations have also been applied under that language. So there has never been any question, since 1933, that 5(b) specifically does authorize the regulation of domestic transfers of credit, banking transactions, et cetera.

Mr. BINGHAM. This seems to me to raise a very serious problem. We are leaving 5(b) alone. That is for wartime. If it is something short of war, should this committee be attempting to define the circumstances under which, let us say, the President can take over a steel mill, or take some other action which is brought about by internal emergency?

Mr. WHALEN. Or close banks.

Mr. MAJAK. One solution might be, if it is the feeling of this committee that certain purely domestic authorities might be necessary under national emergency—and this committee does not have the jurisdiction to provide for those—the subcommittee could recommend to other subcommittees, or appropriate other committees, those areas where it feels that new domestic authority is required, and deal with the problem that way.

Mr. BINGHAM. If it is a real problem, rather than do that which I think would complicate our legislative situation, we should reconsider the question of how we do this. Perhaps we should follow the staff's draft of putting it all under the rubric of the Trading With the Enemy Act, and have that cover the whole shooting match.

We can do it. It is a little bit more cumbersome, but we can do it that way, if doing it the other is going to cause complications.

Mr. MAJAK. In any case, it would be the recommendation of the staff to eliminate the purely domestic authorities in circumstances of national emergencies.

Mr. BINGHAM. Perhaps this is a good point. I wish to discuss some of those problems. I know Mr. Cavanaugh had a problem about the kinds of circumstances under which the Trading With the Enemy Act was used in the past, not in wartime, which would not be permitted under the staff bill.

Is that about the essence of your question?

Mr. CAVANAUGH. That was. I was wondering if at some later date we could get a detailing out of those circumstances by way of examples. I think that it would tend to clarify exactly what we are doing, at least in my mind.

Mr. MAJAK. We could review specifically the uses and speculate as to whether they would have been possible under the formulation that the staff has proposed here. I would suppose in many cases it would depend on whether the President could make a case that a given crisis was an international crisis and not only a national crisis. It is a fairly loose phrase, but it might be possible to estimate.

Mr. WHALEN. Under the domestic powers that you would seek, what you would define as emergency conditions, would they not be achieved under the National Emergencies Act?

Mr. SANTOS. I am sorry, I don't believe that I understand the question.

Mr. MAJAK. If we understand it correctly, the National Emergencies Act does not convey any authority for other than declared national emergencies.

Mr. WHALEN. That is right.

Mr. MAJAK. It does not authorize any specific authorities pursuant to those national emergencies, those must be contained in the statutes.

Mr. WHALEN. The concern, I think is with the phrase in the Trading With the Enemy Act, "or other national emergencies." It does provide authorities, does it not, to declare national emergencies.

Mr. SANTOS. The power of the President pursuant to such an emergency would come under a specific statute. That is why we have the power under 5(b) to regulate a banking transaction, be it domestic or international, however you wish to characterize it.

Mr. BINGHAM. May I point out that title III of the National Emergencies Act says that when the President declares a national emergency, he must specify the provisions of law under which he proposes to act. So it is clear that the Emergency Powers Act does not give him that power.

Mr. WHALEN. Let us pursue that further.

If he has the power to act under law, why would he have to declare a national emergency. We already have that.

Mr. SANTOS. Because the conditions now specified in 5(b) say that he may only do the things in 5(b) if there is a war, or some other national emergency declared by the President. So unless one of those two conditions is met, he may not use 5(b).

Mr. BINGHAM. Let us talk about the case where you and the staff differ—the staff has drafted something which would limit the President's authority to act, absent a declaration of war, on certain internal matters.

You are reluctant to give up the powers that have existed heretofore under the Trading With the Enemy Act. What type of situation are you thinking of where you don't want to give up the authority that has been very convenient for Presidents in the past under the rubric of Trading With the Enemy Act?

Mr. SANTOS. That is a difficult question. Let me point out that there are really two preconditions to this international aspect. Not only must it be from a source outside the United States, that presumably would not be sufficient, unless the property or the transaction being regulated also involved the interests of foreign countries or its nationals.

It is hard to say, of course, what that precludes. To give you an example, and we would not pass on the merits of the particular program,

in 1968 President Johnson put in place a program to control investments from the United States. Quite often those investments were between American corporations and affiliated foreign nationals, subsidiaries of the American corporations.

It is not clear whether this is a transaction in which there is a foreign country or a foreign national interest. It is also not clear that a balance-of-payment situation is a threat arising from a foreign source. It could be argued. We are concerned with the lack of clarity, of course.

In a meeting with the staff we were told that problems like this, to the extent that we are in agreement, could be worked out in this legislative history.

Mr. WHALEN. How did he use that authority under 5(b)?

Mr. SANTOS. Section 5(b) was the basis for that program.

Mr. WHALEN. Was there anything else in the law that gave him the authority to do that, other than 5(b)? Were there any other provisions?

Mr. SANTOS. I frankly don't know. I suspect not.

Mr. WHALEN. Let us follow that through. If we limit 5(b) strictly to declared war, then how would the President be able to exercise the authority to do what he did in 1968?

Mr. SANTOS. In 5(b), if the power to act in a national emergency which is now contained in 5(b) were deleted, and no similar emergency provision were enacted, there would be no authority to act under 5(b) in the banking crisis of 1933, the credit controls applied just prior to the Second World War, the gold regulation, the import surcharge program. The so-called peacetime emergencies have been used quite often, and wartime uses have been less frequent. So there is no authority.

Mr. WHALEN. You are saying that 5(b) applies only to war. You are suggesting, then, that a separate section be created and, in effect, give the President authority to do things similar to those which have been undertaken in the past, but under some more restrictive guidelines.

Mr. SANTOS. That is right. In other words, that the substantive powers of 5(b) would not be altered with the exception of vesting.

Mr. WHALEN. The question is, that the National Emergencies Act be amended to provide for that.

Mr. SANTOS. Quite frankly, Mr. Whalen, it could be, I suppose.

Mr. WHALEN. I am not sure what the validity of the act is, other than scraping away the barnacles and calling for a congressional review of 5(b). I am not sure, if we already have authority to do something, why that would not be done under the National Emergencies Act.

Mr. SANTOS. The only thing in the National Emergencies Act is procedural. It tells the President and the Congress what procedures must be followed in declaring future national emergencies, exercising the powers under them and terminating them.

Mr. WHALEN. When the President declares it, he then cites the statute under which he is going to implement a program, if you have already got it.

Mr. BINGHAM. That statute must be in the form of "When there is a national emergency, the President can do this or that, and the other."

Mr. SANTOS. Frankly, we may be discussing a point which is not at issue between the staff and ourselves.

Mr. WHALEN. A statute which says: "Do this if there is a national emergency."

Mr. SANTOS. Both the staff and the administration agree that certain powers are needed in times of national emergencies, and certain powers are needed in wartime. I don't think that this is the point at issue.

The question really is: How should the powers exercised in time of national emergency differ from those that are exercised in wartime, and what different procedural constraints should be applicable to emergency powers from those exercised in wartime? Those are really the two areas of difference.

Mr. WHALEN. Let me bring out one more point. Under the National Emergencies Act, then, we are in effect referring to some 400 statutes which may be implemented only in the event of a declared emergency. Is that correct?

Mr. MAJAK. That is correct.

Mr. WHALEN. Under whatever we call this new act, we are giving powers that do not exist in statutory form, but may be exercised by the provisions of this very broad act.

Mr. SANTOS. Under one or the other of these bills now before you, there are specific powers that are being granted by both bills. Specific powers are being granted.

Mr. WHALEN. Going back to 5(b), as it has been implemented. It seems to me that it conveys broad powers that do not exist statutorily either in times of war, or national emergency.

Mr. MAJAK. They exist by virtue of section 5(b).

Mr. SANTOS. What we are talking about doing here, the authorities exist, to what extent we will limit the exercise procedurally. From the legal standpoint, the drafting standpoint, I don't think it will make any difference whether we have freestanding new act, as the administration has proposed, or we have a series of specific amendments to 5(b).

Mr. WHALEN. If we give broad authority, equivalent to what has been assumed under 5(b), I doubt that you want to limit it just to national situations.

Mr. SANTOS. It has not been, and I don't know that the administration wants to do so. That is correct.

Mr. BINGHAM. Mr. Cavanaugh.

Mr. DE LA GARZA. The gentleman in the first row appears to have something interesting to say.

Mr. GOLDKLANG. I might be able to clear up the question, Mr. Whalen.

You ask why we have the National Emergencies Act, when this power seems to be self-contained in section 5(b) and allows the President to do certain things during times of emergency. I am not sure that anybody answered this question for you.

I worked quite closely with the Church and Mathias committee on national emergencies. Ever since 1933, when the emergency was declared in the Emergency Banking Act, we have had a continuous state of emergency. There has been at all times a state of emergency ever since 1933. As a result, you have this vast accumulation of statutes, which on their face were devoted to emergency situations which came to be used in more and more mundane, everyday uses.

Everybody agreed, both, on the Hill and in the administration, that we had to unravel this knot somehow. So we finally bit the bullet, and provided that 2 years from a certain date these emergency powers would come to an end. Some of the more complicated statutes like section 5(b) were accepted; they would be dealt with separately.

This was really meant as a great unwinding process, which would take us out of the old emergencies, and provide a more regularized system whereby these declarations were named, and whereby they did at some time come to an end.

Mr. WHALEN. May I inquire whether those emergencies that had been declared, had been declared under the authority of 5(b), or other powers?

Mr. MAJAK. There was, in fact, no specific statutory authority for the declaration of national emergency that was in the National Emergencies Act. It was regarded as an inherent authority of the President.

Mr. GOLDKLANG. Inherent authority of the President, or something implied in language of statutes, such as the Trading With the Enemy Act. If the act says that during any period of national emergency declared by the President, he may do such and such, it at least implies that he has the power to declare such an emergency. Whatever power he has is only as a result of these statutes, which provide that certain things happen during emergencies, and is not based on any inherent constitutional powers.

Mr. CAVANAUGH. I want to know if the administration's position is that there should be no distinction of powers between emergencies whose origin is substantially of foreign source, from those emergencies that may be purely domestic.

The committee is saying that we should have a foreign source separate emergency powers restrictions definition. To go further than that, to say that domestic emergencies are appropriately or adequately dealt with through existing laws.

Mr. MAJAK. We don't make that judgment. We don't argue that certain domestic emergency powers may be necessary, and they may or may not exist elsewhere, but our point is that they should not be mixed with international emergency powers.

Mr. CAVANAUGH. The administration's view is that they should.

Mr. SANTOS. Going back to what I said at the outset, the administration does not have a final position on a point of that importance. But our judgment of the draft that the staff presented was that at the very least the foreign source wording should be modified to make it clear that it would not be a source exclusively foreign, but it could be of a mixed nature.

Quite frankly, just to add a point, and this is again not an administration position, but reflects the position of the agencies that have discussed this, there is a feeling that the powers that are needed, particularly in the banking transactions, trasnfer of credit situations, the powers that are needed to regulate those kinds of transactions are essentially identical whether the source be foreign or domestic.

In fact, it is really quite hard to identify the source. It may be a foreign source that affects the domestic situation which creates a crisis, or a domestic action may create a foreign problem, which in turn creates a domestic crisis. These things are very hard to follow through.

Frankly, without saying that the administration would favor the two powers be treated in the same statute, it certainly is true that the

administration tends to feel that it is difficult to define what is foreign and what is domestic, and the powers are essentially the same in any case.

Mr. DE LA GARZA. To what extent do the individual agencies get involved without the Presidential involvement? I know the Comptroller of the Currency just goes out and tells banks, "You can't send any money out, and you can't take any money in. You will have to let us know when a foreign power deposits more than $3, etc."

How does that fit in this business? Those powers are not exercised pursuant to section 5(b). Those are exercised under a different provision than the 5(b) powers, and they have generally involved the declaration of national emergency.

Mr. SANTOS. It is not pursuant to section 5(b).

Mr. DE LA GARZA. If there is an effective law or regulation some place, why involve it here.

Mr. SANTOS. That is a good question.

To the extent that domestic actions under section 5(b) are authorized by existing legislation, this foreign source qualification may not affect the President's power. In other words, to the extent that 5(b) authorizes the regulation of domestic transfers of credit and banking transactions, it may be that there is existing legislation to cover all possible domestic situations in which 5(b) is used. We are not certain, quite frankly.

Mr. MAJAK. I agree with that. That is why I asked Mr. Celada sometime ago to compile for the staff and for the committee, and we have this material available if you would like to review it, those other statutes which might overlap with the Trading With the Enemy Act authorities.

My impression is that there are a number. He did compile a list of other statutes which provide specifically for certain domestic authorities that are also conceivably provided for here.

So this is one of the reasons that it would make sense to try to eliminate domestic controls from the statute, particularly to the extent that they are provided for elsewhere. If there are additional statutes needed, we would be in a position to recommend those.

Mr. BINGHAM. The fact is that the administration has had this very convenient tool to work with when they did not have anything else, and they have used it in ways that often had no relation to the original emergency at all.

What we are saying, what the gentleman is saying, and what I am inclined to say is, they feel they need powers to do something with regard to banking transactions that have nothing to do with foreign emergencies.

If they need powers of some other sort, they ought to come and ask for those powers specifically and for legislation that would go to the appropriate domestic committee. But this bill, this law, or its successor, should not be used as a crutch for the inability of the administration to devise new specific legislation for their needs.

Mr. CAVANAUGH. Mr. Chairman, I will make a further point for the administration, and maybe our staff would respond to it.

It concerns me when you say that the powers needed, or appropriate, would vary whether the emergency were domestic or international.

Mr. SANTOS. Certainly, in the banking area, all powers would be the same with respect to domestic emergencies.

Mr. CAVANAUGH. The danger that the chairman points out, when we mix those two, we can very well cloud appropriate limitations of power because it is much easier to be generous with dispensing power when you are confronted with an international threat. We have been using that, I think, to exercise powers when the problem is purely domestic, and in the domestic economic realm.

Mr. WHALEN. My concern, since we have begun oversight in this area, has been that this law involves "apples" and "oranges." The act was originally passed in October 1917, during the period of the First World War. The apple is the phrase "during a time of war." The orange is the next phrase, "during any other period of national emergency."

It seems to me that the second phrase is being used rather repeatedly to involve our Government in issues that are purely of domestic origin and concern. So we have to separate them out.

What this committee has to decide is how we are going to concern ourselves with international emergencies. Then, if the administration has concerns about powers that have been previously assumed under 5(b) in domestic situations, maybe they ought to go to the appropriate standing committees and get similar legislation.

Mr. SANTOS. Now you have addressed an issue that we have addressed earlier. Is it simply a desire to take out the noninternational powers in 5(b) for jurisdictional reasons, or for other reasons. I gather you are saying that there are policy reasons for doing that.

Mr. WHALEN. If I were sitting in your seat, speaking for the administration, inasmuch as the executive branch since 1917 has had 5(b) as a tool to invoke powers in dealing with domestic problems, I would want that authority to continue in some form.

Mr. SANTOS. That is true. At the very least it is fair to say that if this power is deleted from 5(b), mechanisms and procedures ought to be put in place to find out what loss is occurring as a result of this deletion.

The administration should be asked, and the other committees should be notified that, perhaps, at the very same time that the statute is amended in that way, legislation to convey the domestic powers should be considered.

Mr. BINGHAM. Hasn't this been done? Hasn't that kind of a review been made?

Mr. MAJAK. Only the review that I requested by the Library of Congress to explore the other statutory authorities. I must say that they are rather spotty. Maybe Mr. Celada would summarize them.

Mr. CELADA. Actually my colleague prepared that portion of the memo. I restricted my comments to judicial interpretations. I do know that we both agonized in trying to find counterpart or equivalent authorities which would enable the President to take action that he can or has taken under 5(b).

I think it is realistic to assume that if such equivalent authority exists the administration would have invoked it.

I am just looking through the special print which Senator Mathias and Senator Church had prepared on the 400 laws, and I see nothing on there that is the equivalent to the authority that has allowed the President to take some of the action that he has taken relating to purely domestic situations.

Mr. MOHRMAN.[1] I assume that those laws are only laws relating to national emergencies. There may also be laws applicable in nonemergency situations which are relevant.

[1] Mr. William C. Mohrman, Assistant Counsel, Office of the Legislative Counsel.

Mr. CELADA. To make another point clear, many of the emergency laws provide for either congressional declarations of national emergency, or Presidential declarations of national emergency. When you have one or the other of those declarations, then presumably the authorities contained in statutes which relate to all 50 titles of the Code can be utilized.

To reinforce the point that I have made, to reemphasize it. I am not certain, in fact I am rather dubious that there is in place legislation which would allow the President to take some of the extraordinary actions that he has taken with respect to foreign investments and things of that kind.

In other words, 5(b) has been utilized because it is the only clear-cut authority for taking that kind of action.

Mr. SANTOS. I am afraid that is what undoubtedly has been the problem, quite often by virtue of the fact that something is an emergency, it is unforeseen, and the situation could not have been provided for.

While it is undoubtedly upsetting to Congress to have an open ended statute, and I think that this is a fair description, it certainly does cover situations that might not be predictable.

The administration is certainly in favor of Congress retaining a very careful scrutiny of what is being done pursuant to the statute.

Mr. BINGHAM. There is another aspect to this that we ought to recall, and it was brought up by some of the witnesses.

There are powers being exercised here under the color of national emergency which would be of questionable constitutionality if they were not being linked to an emergency of the character of war.

As I recall the question was seriously raised that some of the things that the administration has done, had they in fact been forced to rely on the existing factual situation and not to rely on emergencies that had no connection, might well have been ruled unconstitutional. We have to face that problem too.

Mr. CAVANAUGH. The powers here, dealing with interference with property rights, exercised purely in a domestic economic setting would have a very different color and complexion constitutionally.

Mr. MAJAK. What you suggest is the authority that most concerned us on the staff. The power to vest property, or control the uses of property, or rights to property, if it is in a purely domestic context, is an extraordinary authority.

Mr. CAVANAUGH. The administration seems to concede that, but I would go back to your earlier point, hoping again that you would retreat even further and say that you don't feel a great deal of difference in the nature of the problems where the power is needed, whether it be a domestic emergency.

Mr. SANTOS. First of all, let me address the question. I think the Constitution would preclude the use of certain powers under 5(b).

Mr. CAVANAUGH. To complete my point, my point is that even addressing it from the administration's viewpoint precludes us from looking at those differences. If you start from the premise that the powers that are needed are the same whether it is a domestic or foreign——

Mr. SANTOS. If this is the impression that I conveyed, I am afraid that I was in error. I did not mean to say that all of the powers now given under 5(b) are the same, whether or not the source of the emergency is domestic or foreign.

What I meant to say, certainly in the area of banking transactions, which is one of the phrases that is specifically modified in the staff draft, the action taken may be the same, whether or not the source of the problem is international or domestic. There may still be a need to stop banking transactions, freeze transfers, regardless of whether the source is foreign or domestic.

Mr. CAVANAUGH. But the justification may be significantly different, and the appropriateness of the justification may be significantly different.

Mr. SANTOS. Absolutely. But the characterization of a problem as domestic or foreign is very difficult. If there is a failure of credit, or if a particular country cannot pay its debts, the net result may be the same—a New York bank finds itself unable to cover its obligations.

The same problem arises if there is a domestic emergency, the actions are the same to deal with those two problems. But I don't think that it would be fair to characterize as an administration position the assertion that the powers are identical, and there is no difference in the justification—

Mr. DE LA GARZA. May I ask when might we expect a signed off administration position?

Mr. SANTOS. We have basically agreed on all the provisions of the bill that you have before you with the exception of what I believe is the last provision regarding the Export Administration Act. We would expect that disagreement to be resolved by the close of business tomorrow.

Mr. WHALEN. Wasn't that put in as an administration suggestion?

Mr. SANTOS. It was. It was in the draft bill, but unfortunately that draft bill has not gone through the interagency clearance process.

Mr. DE LA GARZA. You mean the embargoes and all of that?

Mr. SANTOS. The bill that you are looking at, Mr. de la Garza, is not the administration's.

Mr. WHALEN. Let me take another instance where 5(b) was invoked. Didn't President Nixon in 1971 also use the Trading With the Enemy Act to implement the 10 percent surcharge. This would seem to me to be imposing a tax which only the Congress has the right to impose through legislation initiated in the Ways and Means Committee.

I just don't see where there was any national emergency then. It would seem to me that President Carter could do the same thing, couldn't he?

Mr. SANTOS. The Trade Act of 1974 does now authorize that sort of action.

Mr. MAJAK. That illustrates our point. That is, if those authorities are necessary and appropriate, they should be provided for in the appropriate context.

Mr. SANTOS. This was an instance where that action could be authorized.

Mr. WHALEN. I am not sure that there was a national emergency.

Mr. GOLDKLANG. That, in fact, showed the interplay between the domestic and the international side, and why it is sometimes so difficult to separate them out. Because of the economic situation, acting under the Economic Stabilization Act, a price freeze was declared domestically. At the same time the President declared a national

emergency, calling upon the Nation to strengthen its international economic position. The two were closely tied together.

Mr. WHALEN. The price freeze was a result of the Defense Procurement Act, which was passed a year before, in 1970.

Mr. GOLDKLANG. There was a separate piece of legislation called the Economic Stabilization Act which was enacted at the same time as the Defense Production Act was amended. That in no way depended on the declaration of a national emergency, which gets me back to a point that Mr. Bingham made. I think that someone ought to say something about that.

It is the question of the relationship between the declaration of national emergency and the Constitution. We have always taken the view that although you have a law which requires a declaration to trigger it and use it, that declaration in of itself does not excuse you from complying completely with the Constitution.

I think the example I gave just now, where you have the Economic Stabilization Act which had no declaration required, and perhaps the surcharge, would show that there has never been any specific pattern. The emergency laws that have been upheld by the Supreme Court, dealing with very serious economic controls such as price control, did not have such a declaration.

Therefore, taking the words "national emergency" out would not necessarily cripple law, nor do they necessarily make something constitutional which would otherwise be unconstitutional. Therefore, I am not sure that the witnesses meant to suggest that merely because the words "national emergency" are in there sometimes it makes things legal which otherwise would not have been lawful.

Congress often has other standards and laws besides national emergency, and laws have been upheld on that ground.

Mr. BINGHAM. Could we get back to the types of situations. You have identified one. What other types of situations are there on which the staff bill would not permit administration action, except in times of war.

Mr. MAJAK. Mr. Bingham, certainly the vesting authority is excluded in the administration bill.

Mr. BINGHAM. The freezing of assets, would that be permitted?

Mr. MAJAK. Control of foreign exchange would be permitted. Credit transfers, if they were purely domestic, would not be permitted. Credit transactions and banking transactions if they were purely domestic would not be permitted except in times of war.

Mr. BINGHAM. You mean prevention.

Mr. MAJAK. Involving purely domestic emergencies.

Mr. SANTOS. It is my understanding that it would not be permitted in time of war or national emergency.

Mr. MAJAK. We will look at that. Clearly, it is ruled out in domestic situations.

Mr. SANTOS. Before you go, and I have heard the buzzer, we have a number of other comments on the draft that we have prepared and that we would like to make, if time permits.

Mr. BINGHAM. What is the pleasure of the subcommittee?

I think perhaps we should recess until Monday. Meanwhile, Mr. Santos will try to get the administration position.

I would suggest, Mr. Majak, that the staff prepare a revision of the staff bill along the lines that were tentatively agreed on as a style and format. We will have a look at that again. Then we will be able to start markup or not, depending on how the members feel. Is that agreeable?

Mr. CAVANAUGH. Do I understand that the administration, or Mr. Santos, will seek an administration position, a clear separation of emergency powers for foreign source and domestic?

Mr. SANTOS. I can promise to seek one. I don't mean to sound facetious. I will make every effort to seek an administration position. The problem is I know that some of the people who make those decisions at the Treasury have been out of the country. We have 1 day left.

Mr. CAVANAUGH. I would like to be assured that you are thinking about it.

Mr. SANTOS. We are thinking about it. We will certainly have our draft bill before you, if at all possible, by the end of business tomorrow.

Mr. BINGHAM. I understood you to say that your draft bill, except for the final paragraph——

Mr. SANTOS. Reflects the views of the three agencies.

Mr. BINGHAM. We will meet again at 2 o'clock on Monday.

[Whereupon, at 4:05 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Monday, June 6, 1977.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

Markup of Trading With the Enemy Reform Legislation

WEDNESDAY, JUNE 8, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The committee met in open markup session at 2:20 p.m., in room 2255, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The subcommittee will be in order.

We have today a new staff draft which has only just been made available to members. It has been redrafted by the staff and counsel in the light of the comments that were made the other day. I have had a chance to look it over, and I think it is in very good shape. There are a few remaining issues that I would like to suggest.

I would suggest that we continue today with informal discussion and clarification of any questions. The administration hasn't had an opportunity to examine this draft. On the other hand, I hope that you have for us today a statement of at least the administration's policy as expressed in the earlier draft. I don't think that the two are that different.

We are under a time constraint, being obligated to have a full committee report to the House by June 15, only a week away. I would hope that we can actually mark up this bill in the subcommittee tomorrow, and send it on to the full committee. Hopefully, we can deal with it in the full committee early next week.

For the benefit of the administration, let me say that I will expect you to have final comments now, or even tomorrow. I think that it would be time enough if you get comments to us for the full committee meeting. If you have substantial changes that need to be made, we can use the technique of submitting a clean bill. One thing we ought to do today, it seems to me, if we are to mark up this bill tomorrow, is to introduce the bill today. I don't know if there is any reason not to do that. Perhaps, we can mark up a working draft. I don't know if there is any objection, parliamentary-inquiry-wise, to the proposal of a working draft.

Mr. WHALEN. I think that we have done that before, Mr. Chairman. If there are changes, it might be simpler to introduce them after the subcommittee——

Mr. MAJAK. The third course is to have a committee print, which we can have made overnight and would be more manageable.

Mr. BINGHAM. This, by the way, is in two pieces. There is a draft bill, and there are also two separate pages of findings and purposes of section 202. There are three pages of findings and purposes.

At this stage, I would like to ask Mr. Majak to explain the bill briefly. Since I have had a chance to go over it and I have a meeting at 3 o'clock, I will have to leave at three, but the members that are here can carry on in an informal meeting.

Mr. MAJAK. Mr. Chairman, let me first briefly point out that there is another document in the file that responds to a question that was raised in our first markup session regarding which of the statutes are exempted by the National Emergencies Act, and would presumably need to be acted upon. There is a summary of them now available in the folder, in case members are still concerned about that question.

Mr. BINGHAM. Are any of those in our committee?

Mr. MAJAK. They are not. Two are, by our judgment at least, probably within the jurisdiction of the Armed Services Committee, the other three are either Public Works or Government Operations, or perhaps both.

The new staff draft, which is dated June 8, is the product of both the subcommittee's suggestions at our first markup, and a meeting with the administration and with our own drafter. I will go through it quickly, pointing out what I think are major changes.

You will see immediately, of course, that the bill is organized differently than the original staff draft. Title I removes from the War Powers resolution and from the Trading With the Enemy Act section 5(b) authority with respect to national emergencies. So that section 5 (b) now becomes strictly and purely a grant of authority under circumstances of war declared by the Congress.

Title II, which we will get to in just a moment, picks up the authorities with respect to national emergencies and spells them out further. On page 2, (b), there is a grandfather provision for existing uses in section 5(b) authority, and we have made some changes in that area which I will draw to your attention.

TITLE I

We have provided in the first staff draft virtually a totally unlimited grandfathering of existing uses of 5(b) with respect to the situations in which they are presently being used. We have narrowed that exemption somewhat by stipulating that these existing uses would be, in any case, subject to the provisions of the National Emergencies Act. The meaning of that, of course, would be that on or about September 14, 1978, these existing uses would be terminated as are all uses of national emergency powers according to the National Emergencies Act, unless the President at that time chose to redeclare a national emergency with respect to these situations.

If he did so, the new National Emergency would then go forward for a year, at which time, and on every yearly anniversary, he again would have to rejustify and redeclare or terminate the authorities.

Mr. BINGHAM. May I interrupt you there?

My recollection is that the administration witnesses testified and indicated that they would have no objection to that application of the National Emergencies Act and the existing provisions. You might check back on that, but it is my recollection.

Mr. WHALEN. We are grandfathering the present emergencies, but subjecting them to annual review, essentially?

Mr. MAJAK. There is one aspect of the National Emergencies Act, even where we are grandfathering, and that is a provision for termination of the national emergency by concurrent resolution at any time, which is another provision of the National Emergencies Act. The existing uses of 5(b) powers would never at any time be subject to a repeal by concurrent resolution of Congress. In that sense, they are totally grandfathered.

Mr. WHALEN. Where is that?

Mr. MAJAK. At the bottom of page 2, the last parenthetical clause.

Mr. BINGHAM. I have a question, and perhaps we could spend a few minutes on this before we go on. I do have a question as to whether subparagraph (2) on page 2 is desirable. Would you explain that, and indicate the reason for that?

Mr. MAJAK. Our reading of that would be that with respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by section 5(b).

So, if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to that situation.

Mr. BINGHAM. I have a serious question about that. It seems to me that if the President has not up to now used some authority that he has under section 5(b) in connection with those cases where 5(b) has been applied, I don't know why it should be necessary to give him authority to expand what has already been done. It is really going beyond grandfathering.

It seems to me that grandfathering applies to what has been done to date, and that should be ample authority. I think on this point we would be particularly anxious to have the administration's reaction.

Mr. MAJAK. If I may perhaps state it another way, I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage.

Mr. BINGHAM. In those situations?

Mr. MAJAK. Yes.

Mr. CAVANAUGH. Mr. Chairman, I would like to ask why we are grandfathering anything at all.

Mr. MAJAK. The staff has presumed that our function here was to reform the procedures and authorities involved, but not to try to deal with existing uses of these authorities. It was our understanding that this bill was not a vehicle for that.

If the committee, or the Congress, wishes to make changes in the Cuban embargo, or the Vietnam embargo, which are presently being exercised, in part, under this statute, that could be done separately. Our purpose here was a revision of the broad mechanisms for these

kinds of authorities and not any effort to deal with those particular circumstances. This would argue that we remove these particular uses from consideration.

Mr. BINGHAM. I think, if I may say, if we were to attempt to do otherwise, this bill would become enormously controversial and would reach into substance rather than being essentially a revision of procedures. It is certainly a valid question. I happen to be in favor of the repeal of the embargo against Cuba and against Vietnam as well. However, I am inclined to think that this is not the proper place. We will get this all fouled up, so to speak, if we attempt to do that here.

Mr. CAVANAUGH. I can appreciate that, Mr. Chairman. The reason that I asked the question, in my own mind and in acting on the legislation, is that I would like to be appreciative of, in what situations this legislation would create alterations of existing policy.

In that regard, I would like to have some understanding myself of those instances where 5(b) is currently operative, where the powers of 5(b) are currently operative, which would not be tolerated under the powers that would be conferred?

Mr. MAJAK. You mean if there were no grandfathering? We certainly could provide you with a listing of the current uses. They are, to some extent, reflected in the thick volume compiling the regulations, the Executive orders, which have been issued pursuant to this statute. We can, of course, provide it within a different form as well.

If there were no grandfathering provisions, none of the current uses would be effective. There are others besides those that I have mentioned.

Mr. CAVANAUGH. I have seen the list of the current employments, but I am not sure of the new draft. At some point, I think, it is important to understand what the new powers would, indeed, prohibit.

Mr. MAJAK. I think you are asking a different question than I originally understood your question to be, which was, how are we changing the authorities which could be used from those that are presently being used.

Mr. CAVANAUGH. That would be part of it. How are we changing the authorities? Are we restricting authorities that are currently in use?

Mr. MAJAK. I will get to that, I think, in a moment, when we get to the authority question.

Mr. BINGHAM. I think Mr. Cavanaugh is asking about, as I understand it, to what extent are we restricting authorities that are currently being used in particular situations under 5(b). It seems to me that we ought to have a list of those, it must be available. I don't mean a very long list.

As I understand it, under this draft, really, all we are doing in the way of restricting those powers is to say that starting in October of next year, the President would have to redeclare the emergency and rejustify, in fact, the continuation of the controls. Beyond that, there would be no limitation on the authorities.

Mr. MAJAK. The President would have to redeclare the emergencies. Each use would require its own redeclaration of national emergency.

Mr. BINGHAM. Right.

Mr. CAVANAUGH. If that is indeed the case, Mr. Chairman, I am not sure that I appreciate the comment of the enormity of the controversy

that would arise by no grandfathering. It seems to me that even in the case of Cuba and Vietnam, if it is justified in its continuation, it would be justified to review again.

Mr. BINGHAM. I think that we should pursue that further, but let us go on with the explanation.

Mr. MAJAK. On page 3, we propose to make some cleanup changes in the wartime authorities. These are removals simply of phrases which appear to have no meaning or importance there. I think we should emphasize the point, at this time, that in removing national emergencies from section 5(b) and making only these very slight revisions in the wartime language, we are, in effect, leaving the wartime powers exactly as they presently are in 5(b).

Section 103 on page 3 would add—would increase the criminal penalties for violations from $10,000 to $50,000. This has been recommended by the administration and that is consistent with the penalties in the Export Administration Act, which are comparable.

TITLE II

Title II is the creation of an entirely new statute dealing with the use of economic powers in times of national emergency.

Mr. BINGHAM. May I interrupt you 1 second, since I may have to leave. Would you go back for a moment to the question that Mr. Cavanaugh raised. There is a parallel here with the war powers resolution. When we drafted the war powers resolution, and drafted it over the President's veto, we eliminated Vietnam. We grandfathered the Vietnam-Cambodia war, in effect. I think that it is fair to say that we would never have gotten the bill through, and certainly not over the President's veto, if we had not done that.

Mr. MAJAK. We have a rider at the bottom of page 3 for a section of findings and purposes, which the committee may choose to include in this legislation. We have been working on the drafting of those separately, and it is a section which would not be essential.

I will suggest in a minute the reasons for which we might recommend the inclusion of such a section. You will find a draft of findings and purposes separately in your folders, a separate draft of section 202, to which I will return shortly.

Page 4 spells out the essence of the new procedures and authorities which may be used in cases of national emergency, and relates them to the existing war powers resolution and existing National Emergencies Act.

Here again we have made a rather fundamental change, and I will try to explain that.

Mr. WHALEN. Before you do, I don't suppose that it is possible to do it, or is there any attempt to define "extraordinary threat"?

Mr. MAJAK. No; we have not created such a definition.

Mr. WHALEN. I did not mean precisely.

Mr. CAVANAUGH. Is it opposed to an ordinary thing?

Mr. MAJAK. As you will recall, in the earlier staff draft there were two circumstances under which the President could exercise the authorities, the economic authorities. One was at the declaration of a national emergency, and the second was if he got himself involved in hostilities using U.S. forces abroad, as defined by the war powers resolution.

We were dissatisfied with that double provision for the use of those authorities for a couple of reasons. One is that it was not clear in our earlier draft whether they were mutually exclusive, or whether both could be invoked at the same time.

Second, by providing that the entry into hostilities, in the absence of a declaration of war, would provide the President with these authorities seemed, in a sense, to be an incentive for the President to engage in such hostilities, which is certainly not the purpose of the war powers resolution.

We were bothered by the fact that these authorities could be exercised pursuant to hostilities alone. So we have tried to restructure that relationship. Section 203 provides what is now the only basis for the exercise of these economic authorities; namely, the declaration of a national emergency.

Subsection (d) in the lower half of page 4 and all of page 5 provides that if, while the President is exercising any of these authorities pursuant to a national emergency, he becomes involved in hostilities abroad as defined by the War Powers Resolution, then certain procedural requirements come into play. If he is simply operating in a national emergency, the procedures of the National Emergencies Act would apply. If, however, hostilities are involved, then the termination requirements of the War Powers Resolution would be applicable.

We provide that within a period of 30 days after the hostilities are concluded, or are required to be concluded pursuant to the War Powers Resolution, the President would also lose his economic authorities unless he redeclared a national emergency with respect to that situation.

In effect, he is required to rejustify the need for his economic authorities 30 days after the hostilities are concluded pursuant to the War Powers Resolution. We felt that this was a more reasonable way to bring the war powers mechanism into play, by simply providing that he has to rejustify his need for the economic authorities in a period of 30 days after the actual hostilities are concluded.

As I said before, if there are no hostilities, the President is operating simply pursuant to a national emergency, and all the procedures of the National Emergencies Act will apply.

On page 6 we get into the basic authorities which can be exercised here, and these are largely the same but not precisely the same as those contained in 5(b). The three areas which we have reserved to 5(b), and which are not provided here are the powers to vest foreign property, certain powers relating to the hoarding of gold and bullion, and the authority to seize records with respect to foreign property.

In the first two cases, vesting and the hoarding of gold and bullion, the administration, as well as the staff feel that these authorities are appropriate in wartime but probably not necessary in national emergencies. In the case of seizure of documents and records with respect to foreign property, the staff has removed that authority. We were not able to determine what would justify these actions.

The administration may wish to focus its attention on this, and comment. We have a provision for the seizure of records which might be more appropriate in wartime than in national emergencies.

Mr. BINGHAM. This underlies the fact that the draft does require—does permit the President to require the production of all documents.

Mr. MAJAK. And presumably access to them. However, we have removed the specific procedure to seizure. I would point out one more significant thing about the basic authorities. We had a discussion in the first markup concerning whether the authorities in national emergencies ought to extend to both foreign and domestic remedies. It was the position of the staff in the earlier draft that we ought to place some restrictions on domestic remedies.

We have since softened our views on that, and on page 6 (ii), you will see that we provide authority here for the transfer of credit or payments between, by or through any banking institutions. We have removed our earlier limiting phrase which limited that authority to asssets involving foreign interests.

We have, however, retained—and I should have pointed this out, I guess, on page 4—we have retained what is probably the more important provision which limits the use of this act to foreign situations, namely, the phrase "extraordinary threat which has its source in whole or in part outside the United States."

So, a national emergency can only be declared for essentially foreign problems, but we have retained what the administration has requested, namely some flexibility with respect to the remedies that can be used both domestic and foreign.

Mr. WHALEN. Could you give us an example of where this remedy would be applied?

Mr. MAJAK. Yes, we were looking for—do you mean the use of the domestic remedy?

Mr. WHALEN. What situation, No. 1, might arise in which this would be used; second, how it could be used?

Mr. MAJAK. In, for example, the national emergency declared in 1941 by President Roosevelt, the term "banking institution" was interpreted to include individuals or parties that contracted for consumer durables, which would mean washing machines, or something.

The President, therefore, was able to control that kind of domestic credit so that it would be essentially a domestic remedy, even though obviously it was, in the President's mind, related to a certain foreign problem.

Mr. WHALEN. Carry this a little bit further, and relate it to the approach the bill takes. Suppose we have a very serious imbalance in trade, serious enough that the President would want to declare an emergency. Would he be able to declare an emergency under this act; and if so, I would imagine, he would be able to impose limitations on consumer credit?

Mr. MAJAK. I would presume that the answer to both of those would be, yes.

Mr. BINGHAM. Does the question come up as to whether the Congress should have veto authority over the definition of what the President might issue under section 206?

Mr. MAJAK. The other document that we provided separately is the provision for congressional veto of the regulations pursuant to this act. This would be one way of giving the Congress a rather specific check over the uses of the act, including cases where the President

might choose to use domestic remedies, or where the Congress might think that such remedies are appropriate.

Mr. BINGHAM. I think the case you cite of President Roosevelt's extension of the term "banking institution," would cover something that would normally not be thought of in the banking institution as an example of where perhaps the Congress should have authority over a definition issued by the President in regulation. Bearing in mind that in all cases the declaration of emergency under the National Emergencies Act is subject to congressional veto, this would be a more limited exercise of that power?

Mr. MAJAK. Yes. While we are stopping, this is jumping ahead in the bill, but I would point out that on page 10, section 206, on the bottom, there is the authority to issue the rules and regulations.

The original Trading With the Enemy Act contained a broad authority to issue rules and regulations, including definitions and definition of terms. Section 206, as we have it, is still quite broad, and it still includes, as the administration has urged, specific reference to describing of definitions, although it is slightly less broad than the definition in the existing Trading With the Enemy Act.

I suppose that here, again, it could be an argument for inclusion of a provision which would allow Congress to veto certain regulations.

Mr. WHALEN. Thank you.

Mr. MAJAK. I think that is all.

Mr. CAVANAUGH. I would like you to readdress yourself to 204 (a) and (b). (b) is simply applicable to interests of foreign countries.

Mr. MAJAK. That is correct.

Mr. CAVANAUGH. I would draw your attention to (ii).

Mr. MAJAK. I may be incorrect on that point.

Mr. Santos, would you like to address this?

STATEMENT OF LEONARD E. SANTOS, ATTORNEY ADVISER, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Mr. SANTOS. If you would allow me, Mr. Cavanaugh, I think the question that you have in mind is whether 204(a) may be used in a situation where there is a threat, an extraordinary threat from a source which is substantially outside of the United States. Is that the question?

This language under 204 is no longer modified by the term "to the extent to which there is a foreign country or national interest."

Mr. CAVANAUGH. The power would arise under the definition of 202?

Mr. MAJAK. That is right.

Mr. CAVANAUGH. The source outside the United States, I understand that. Once the application has been made, it gives rise to these powers in 204.

Mr. SANTOS. Which powers are not restricted to foreign nationals.

Mr. CAVANAUGH. In particular, (a) (2) would confer upon the President absolute, unlimited, and unrestricted power to place any restrictions, regulations, or investigations on the entire domestic banking system of the country.

Mr. MAJAK. Yes, but you were referring to (B).

Mr. CAVANAUGH. No.

Mr. MAJAK. It would apply whether or not there was a foreign interest or not. (B), however, would apply only to those properties which involve a foreign interest.

Mr. CAVANAUGH. Right, and again the reason for that is——

Mr. SANTOS. May I interrupt for just a moment. I want to point out that my understanding is that whatever is done pursuant to section 204, it must be to carry out the purposes that are specified in 202. So it is not anything he wishes to do with banking institutions. Presumably, it would have to be consistent with 202.

The other thing I would point out, (A) is not restricted to powers involving the interest of a foreign country or national. It is (B) that is modified by that term. So with respect to banking transactions, transactions of foreign exchange, and the importing or exporting of currency or securities, those powers can be exercised whether or not there were foreign national interest in those.

It is (B), the power to investigate, and so forth, that is modified by the phrase "to the extent that there is a foreign country or national interest therein."

Mr. MAJAK. Is your question, why do we divide them that way?

Mr. CAVANAUGH. Why we confer those powers in (a) without reference to foreign countries or nationals?

Mr. MAJAK. That is basically something that the administration wants to do.

Mr. SANTOS. This was an issue that you raised and asked us to look into.

Mr. CAVANAUGH. I don't think that it was specifically, but in general.

Mr. SANTOS. We had pointed out in the previous draft that the power to regulate banking transactions is one of the things that are now listed under (i), (ii), and (iii) in the previous drafts. Those powers were modified, at least (i) and (ii) were modified by the phrase "to the extent that there is a foreign country or foreign national interest involved."

We have pointed out that it would be limiting power that is now conferred by 5(b). I don't say or purport to say that the administration opposes or is in favor of deletion. I simply wanted to note that this was what was occurring.

You asked me to consult with the administration, and find out how it felt about that deletion.

Mr. CAVANAUGH. I thought that I was speaking in reference to 202.

Mr. MAJAK. We have retained 202 essentially as it was in the earlier draft, namely, focusing——

Mr. CAVANAUGH. You have changed it from "exclusively," to "substantially."

Mr. SANTOS. The net effect of both of those is somewhat similar in both cases. In one case you are restricting the transaction in which there is a foreign country involved, and in the other case you are saying that there must be a foreign source for the national emergency.

We have gone back and done some research. We do not have a final bill from Congress. The administration is somewhat reluctant to give

a position on the subject, but we did consult, we did do research, and I can state that nobody with whom we have talked felt that the deletion of the domestic aspect now contained in 5(b) would be troublesome.

The Federal Reserve Bank and others pointed out that many of the powers that are now conferred under 5(b) with respect to domestic transactions are now conferred by other sections which have been enacted.

It was pointed out to me that section 12 U.S.C. 95 contains powers, very broad powers during times of national emergencies to regulate the member banks of the Federal Reserve System. That is a power given to the President which has nothing to do with the Trading With the Enemy Act.

With respect to banking transactions involving Federal Reserve banks, there are existing powers apart from 5(b) to regulate. There are other sections which do not or which are not quite as broad as the ones I just cited for you, but do supplement the powers that are now given by 5(b).

So, quite honestly, I am not sure, once the administration is presented with the deletion, the one contemplated in the previous draft of the domestic angle of 5(b) that they would veto it, but we have not gotten a clear administration position on that.

We have cleared this with various agencies that might be interested, and they have not indicated a great concern on this. We perceived from the Federal Reserve Board that they would not be particularly concerned if 5(b) were repealed in its entirety.

I think that it is fair to say that we would not be terribly concerned by the deletion of the domestic angle. However, it is not an administration position until it is presented to them in the form of a bill. I am sure that, then, there will be a firm administration position.

Mr. BINGHAM. In light of this discussion, it seems to me that we should put the limitation back in.

I think the question that Mr. Cavanaugh raises is a very good point. I think that unless there is good reason to do otherwise, it should be as it was before, restricted to banking transactions having some foreign implication. How would the administration react to that?

Mr. SANTOS. Many of the powers with respect to banking transactions that I noted for you are restricted to the powers of the Federal Reserve Board with respect to Federal Reserve banks, and do not extend to national banks. So with respect to national banks, there may be significant gaps left if these modifiers are put in.

Mr. BINGHAM. Under what circumstances does the President need that power? I think that this is a question that we do not resolve in the committee, and which I think can be raised on the floor, namely, providing this authority for purely domestic transactions. Unless we have pretty good reasons to do so, I don't know why we should.

Mr. MAJAK. One argument that the staff found somewhat persuasive on the point was the practical problem of distinguishing between those items which may have a foreign interest, and those which do not, in a bank account.

There are other statutes of which we are aware that make such a distinction, so presumably banks are capable of determining which of their accounts, for example, have foreign interest and which do not. We are not sure that this would be the case in every instance. It might

be difficult to administer this under the summary authorities, if one had to make the distinction between property that did or did not have a foreign interest. We were somewhat persuaded by that.

Mr. BINGHAM. I am going to have to leave in a couple of minutes. I would ask the gentleman to take over the Chair. However, first, I would like to raise a couple of questions.

On page 5, it seems to me that (ii) on the bottom of the page is overkill. I don't see any need for that—"If the Congress is physically unable to see whether the emergency should be terminated." The same is true of the declaration of war.

I would suggest that it would simplify this page, which is very difficult to follow, by eliminating the reference to declared war. That is something that we could consider tomorrow.

Mr. SANTOS. Mr. Chairman, there is one comment that I would like to make to you before you leave. I believe there may be a misapprehension as to the grandfathering, so-called grandfathering clauses.

As I understand this bill, and I have had it before me for perhaps a half hour, it would require that once the 2-year period provided under National Emergencies Act expires, a new national emergency would have to be declared. That is not required by the National Emergencies Act. Section 5(b) is not now under the National Emergencies Act.

Mr. BINGHAM. All that we are doing here is to apply the National Emergencies Act.

Mr. SANTOS. Under the language of this bill, the President must declare a new national emergency. It is about five or six lines from the bottom on page 2, after the words "National Emergencies Act," it says: "If a national emergency is declared for purposes of this subsection."

Mr. WHALEN. If I understood Roger, I think that is correct.

Mr. MAJAK. The President could choose not to extend the authority.

Mr. WHALEN. As it was explained, this is not subjected to any congressional action.

Mr. SANTOS. We understand that, Mr. Whalen. I want to point out, though, that the way it is written, it might be construed that the national emergency would be redeclared rather than merely be extended through congressional notification, and Federal Register notice.

Mr. BINGHAM. Let us look at that again. It is one thing to simply state the declaration of emergency of 20 years ago is extended; it is another thing, and this is what I would propose, to require the President to say the emergency continues. That is what I understood was required, was provided for under the National Emergencies Act.

Mr. SANTOS. I am not sure that it is the same as to say, you will declare a national emergency.

Mr. BINGHAM. All you would be required to say is that the emergency continues. There would not have to be a new emergency.

As a matter of fact, I had somewhat of a similar suggestion on the bottom of page 4, "unless the President declares that the national emergency continues." I would like to suggest the possibility of, at the top of page 4, that the words "unusual and," be included there.

Mr. Whalen asked what is the definition of extraordinary, and we don't attempt to define that. But I think if the words "unusual and" were added, it would stress that this is not intended to cover the case, and continue the problem, which is supposed to be an unusual problem.

Also, we have not had a chance to discuss this draft on findings and purposes. I would hope that the members would stay and do that. I am wondering why in (b) you say that the Congress makes the following declarations, shouldn't that be in purpose?

Mr. MAJAK. The items that follow are a combination of purposes and policies. So rather than saying that we confine the phrase to declarations—I must say that this is the phrase used in the Export Administration Act, which we used as a model here.

Mr. BINGHAM. It means that the Congress declares to authorize and enable the President?

Mr. MAJAK. You are right, the format in the Export Administration Act does not begin at any time with an infinitive.

Mr. BINGHAM. I am sorry that I have to leave, but if the gentlemen would please carry on.

Mr. CAVANAUGH [presiding]. It is your intention to mark up tomorrow?

Mr. BINGHAM. Yes.

Mr. MAJAK. Would you like me to go on at this point?

Mr. CAVANAUGH. Yes.

Mr. MAJAK. I would be prepared to pick up on page 8. I have finished what I had to say about the basic authorities. So turning to page 8, there is a new effort to stipulate that these authorities should not be used for a particular purpose having to do with the first amendment.

So we have again provided in a slightly different form restrictions against use of these authorities to regulate or prohibit personal communications, collection, and dissemination of news and what we now call "uncompensated transfers of items of value."

Mr. CAVANAUGH. I don't understand what subparagraph (3) conveys.

Mr. MAJAK. The existing Trading With the Enemy Act provides that after a war is concluded, the Trading With the Enemy Act shall not be used to prohibit the donation of articles to the country with whom the war was fought, items for humanitarian purposes, relief. Items such as food and clothing, and medicine are specified.

That provision has been used rather loosely and carried over into exercise of these authorities in times of national emergencies. So, ordinarily, when Presidents have exercised those authorities in national emergencies, they have also allowed certain items to be traded. Therefore, financial transactions do occur with respect to those items which are to be provided on a charitable basis, such as clothing, medicine, and food.

That humanitarian exemption, however, has been narrowly interpreted so that, for example, when the American Friends Service Committee a year ago wanted to donate some fishnets to fishermen in Vietnam, they were not allowed to do so. Their license to do so was disapproved on grounds that those fishnets were not humanitarian items, and would contribute to the economy of Vietnam.

We, therefore, define the humanitarian exemptions somewhat more narrowly, at least at the staff level. We feel that it is appropriate. We think, in fact, that there ought to be provisions for reasonable contributions of any kind of items of value, despite the other controls that might exist on a national basis. We have been groping for ways to provide that.

So our subitem 3 here attempts to define a category of goods which could be transferred on a charitable basis, that is, with no compensation. The other restrictions that would apply could not be used to stop such transactions.

Mr. WHALEN. What is the (b) in response to, the portion of——

Mr. MAJAK. That is on the basis of concern by the administration, I believe well founded, that if Americans were allowed to provide charitable contributions to a country that was otherwise controlled—presumably a country that might have a hostile government, that was hostile to the United States in some way—people from that country might also come under pressure by their government to elicit contributions from the United States. Foreign governments might even threaten their citizens with punishment if they did not seek contributions from the United States.

Mr. WHALEN. Simply those citizens of those countries who may have relatives in the United States.

Mr. MAJAK. Yes, and who may be put under pressure to seek contributions.

Mr. WHALEN. Wouldn't the word "against" here be better than "on."

Mr. MAJAK. Yes.

Mr. CAVANAUGH. "Against the proposed recipients?"

Mr. WHALEN. I just raised the question. I am not a grammarian.

Mr. CAVANAUGH. Against the donor.

Mr. MAJAK. The pressure would be put upon the recipient who would, then, appeal to his family in the United States, for example, to send contributions.

I suppose I should point out, and I am sure that the administration will when they comment on this exemption, that this would allow even uncompensated transfers of money. Again, we feel that with these opportunities for Presidential determinations, even reasonable transfers of money would not be prohibited on a person-to-person basis.

Mr. CAVANAUGH. Another problem with this section is (b)(1). Maybe you could verbalize for me what that envisions allowing?

Mr. MAJAK. It envisions allowing——

Mr. CAVANAUGH. Interference with the delivering of the mails, is that wiretapping?

Mr. MAJAK. On the contrary, I think that it would militate against such monitoring, although the phrase which reads "would not involve the transfer of anything of value" would suggest that there would have to be a way of knowing whether a communication did or did not transfer something of value.

Mr. CAVANAUGH. Let me ask you this. If the communication did involve the transfer of anything of value, does this, then, confer authority upon the President to authorize interception of postal communications or wiretapping?

Mr. MAJAK. I think that it would be interpreted that way.

Mr. CAVANAUGH. Other electronic surveillance, outside of other procedures.

Mr. MAJAK. I don't know about other electronic surveillance, but I would think that it would be interpreted to permit interruption of the mails. Indeed, our understanding of the current usage of the Trading

With the Enermy Act is that it is done in any case with the current authorities.

Mr. SANTOS. May I note for a minute that the Constitution continues to apply even when Congress passes an act, and it has been interpreted, I understand, to preclude wiretapping except under court order, and other circumstances of that sort. This, of course, is a complex subject. I don't mean to specify here what the scope of the constitutional restrictions are, but they would continue to apply. If the President were acting on this, it would be governed by those restrictions.

I might add that my understanding of 5(b) in this area has been that the mails have not been opened in the absence of a court order or administrative order.

Mr. CAVANAUGH. So, your answer would be, no, this does not confer new, unique, extra authority upon the President with the exception of the restriction that would be involving the transfer of a thing of value. But the other legal requirements for interception of these communications would apply.

Mr. SANTOS. This language is somewhat new to me, Mr. Cavanaugh, but my understanding is that if the administrator of this law has evidence that something does involve transfer of anything of value, he may, in fact, prevent postal, telegraphic, telephonic, or other personal communications. The question of how he obtains that evidence, if it were by legal or illegal means, would be something that the person would have to raise either with the agency or with the courts.

Mr. CAVANAUGH. My concern is what kind of authority are we conferring.

Mr. SANTOS. Someone has pointed out to me that this language certainly does limit existing authority under 5(b).

Mr. MAJAK. The other case which arises, in the example of the Vietnam embargo, is that, for a time at least, intermittently all mails to Vietnam were interrupted. It was our understanding that this may have been due, in part, to the fact that U.S. postal assets could not be transferred to Vietnamese postal authorities for the purposes of delivering U.S. mail to Vietnam. That is, as we understand it, the way a country is compensated for delivering the mail from one country to another. The mail presumably goes from New York to Hong Kong. Then before it is delivered to Vietnam for final delivery, Vietnam goes to the International Postal Union, and presumably collects a portion of the postage for its part of the delivery.

There was, apparently, some interruption of the transfer of assets from the U.S. Postal Service to the Vietnamese postal service which, at least at times, seemed to hold up the mails. This would be intended, I think, to prohibit these asset controls from being used in that way, which would really have the effect of stopping all mails to a country against which there would be transaction controls.

Mr. SANTOS. I would like to note, again for your information, the history of the embargo against Rhodesia, which is not carried on under 5(b), but is carried under the United Nations participation. I would note a recent security council resolution which requires the closing of the Rhodesian Information Office here in the United States. That is presumably a function that would come in under No. 2.

The United States cannot interfere with first amendment rights, but it can prevent the transfer of funds that would permit that information office to stay in existence. I would doubt that actions such as those would be carried out under 5(b). That could not be done.

Mr. WHALEN. This, however, would not permit Americans to contribute funds to the Rhodesian Information Office.

Mr. SANTOS. I think that is correct. What I am trying to point out here is that the kind of power that has been ordered to be done, the kind of actions that have been in effect authorized by the Security Council to be carried out by the U.S. Government with respect to Rhodesia, admittedly under another power, would not be possible under this section.

Mr. MAJAK. Section 205—I think there have been no significant changes in the consultation of report provision over the earlier staff draft. We have, on page 10, pointed out——

Mr. CAVANAUGH. Why does it read "every possible instance," rather than "every instance?"

Mr. MAJAK. I think that one could visualize instances where it would not be possible to consult before the exercise of authorities. For example, in the case of a sudden attack upon the United States.

This phrase has been used in other statutes, although I don't necessarily consider that to be a justification. But I think that we used the word "possible" because clearly there could be circumstances where it would not be feasible for a President to consult in advance.

On page 11, we are providing for the first time——

Mr. CAVANAUGH. I had another question on page 9, subsection (4), "advises that the actions he proposes to take under this title deal with those circumstances." Is that language, then, to be read as restrictive of that report, that the President would be precluded from taking actions other than those that he proposes in that report?

Mr. MAJAK. There is no such implication. We discussed that particular usage, and what is proposed there, I think, reflects the situation where the President would be consulting with respect to actions that he was about to take.

Mr. WHALEN. Isn't that language really similar to section 3 of the War Powers Resolution Act?

Mr. MAJAK. It is very similar to war powers, but there is no indication there that congressional approval would be required on the actions that he was proposing to take, or was taking, unless, of course, we came to matters of veto of regulations, and so forth, which might make that possible. However, as the draft currently exists, the only implication there is, I think, he would be consulting with Congress at that point.

On page 11, section 207, for the first time the recommendation provides for civil penalities for violation of these restrictions.

TITLE III

Title 3, again, is very similar to the earlier staff draft. It transfers to the Export Administration Act some authority which is necessary, but is used more in relation with the Export Administration Act than under this act—namely, the extension of transaction controls, extraterritorial actions.

This about wraps it up.

Mr. CAVANAUGH. I did have one other question back on page 7, subsection 3, the first sentence of that. I don't understand it.

Mr. MAJAK. I am going to ask Mr. Santos to explain that. It has to do with suits of individuals who freeze assets.

Mr. SANTOS. As I understand it—this language, by the way, is very similar to language now contained in section 5(b)—the purpose of this language was to, shall we say, hold harmless individuals acting pursuant to Government authority when they freeze the bank account of a particular individual.

This section would presumably protect the bank which acted pursuant to a freezing order from being sued by persons claiming that they had no authority to do so. It was intended, in a sense, to provide immunity, assuming that the actions were taken under regulations issued by the Government.

When I use the term immunity, I don't mean to say they could not be sued, but this would provide them with an adequate defense to any action. Taking a specific example, if a bank in the United States were ordered to freeze the accounts of all Cuban nationals, and a Cuban national came to the bank and said: "According to our contract, I am permitted to withdraw all the funds. Please deliver them." The bank could say: "I am sorry. I cannot do so. We have been ordered to freeze your account."

This section would prevent any successful suit against that bank by the foreign national.

Mr. CAVANAUGH. This would absolve one of criminal liability as well as civil liability?

Mr. SANTOS. I would assume that it would cover both criminal and civil penalties. In most instances, it would not be a criminal penalty. It would presumably be some sort of civil suit.

The criminal penalty would only arise in the case of the violation of some law. What we are talking about here is a remedy by one individual against another.

Mr. CAVANAUGH. That is not clear, though. This is a blanket absolution for anything done in connection—I would think that this could be much better stated to arrive at the purposes.

Mr. SANTOS. I would not argue on that point. It is an adoption of the language of 5(b), as you have seen in other instances the language of 5(b) is very broad.

Mr. CAVANAUGH. It is not only broad, it is not understandable.

Mr. SANTOS. I believe that this section has never been used.

Mr. CAVANAUGH. I really don't think that we should have something that is incomprehensible.

Mr. MOHRMAN. Wouldn't it be true anyway, that if someone is directed by the Government to do something, he could not be held liable for his compliance?

Mr. SANTOS. It might depend on the contract.

Mr. MAJAK. Banks have to use a lot of discretion in carrying out the requirements of the regulations. For example, you will recall, Mr. Whalen, when the Vietnamese embargo was imposed, the accounts of all Vietnamese nationals in this country were directed to be frozen. Chase Manhattan, or somebody, froze, among other things, the accounts of the Vietnamese diplomatic mission to the United Nations. So

they couldn't draw on their account for a matter of a few days until the Treasury Department clarified it and corrected it. This was a case of Chase Manhattan simply having to make a judgment as to what the regulations meant. Obviously, this was a situation where they might have been subject to suit.

Mr. CAVANAUGH. I would appreciate it if you would find some better language.

Mr. WHALEN. On title 3, the subparagraph numbers take into consideration the bill that is now pending before us.

Mr. MAJAK. That is a good question. I don't know whether it does or not.

Mr. WHALEN. I looked, and I could not find it in there.

Mr. MOHRMAN. The amendments in section 301(b) starting at the bottom of page 11, are amendments to provisions of the pending Export Administration Act legislation which should become law within the next couple of weeks.

Mr. WHALEN. I presumed they would because I could not find them in here.

Mr. MOHRMAN. We are undoing what we have not done yet.

Mr. WHALEN. In section 208, are you proposing that this be incorporated in the bill?

Mr. MAJAK. Before I directly answer your question, let me say that both with respect to the statement of policies and this draft of the congressional mechanism for congressional veto regulations, the staff makes no recommendations on these two points. We simply draw them to your attention as possible ways for the subcommittee to provide for a closer congressional check, particularly in the two areas where a statute continues to be quite broad—the ability of the President to issue regulations and take liberty with definitions, and the continued availability of certain domestic authorities to be used. The bill remains that broad, in our view, in those areas. This would be one way for there to be a closer check in those areas.

Mr. WHALEN. We not only address ourselves to the emergency per se, but also regulations, if we adopted this?

Mr. MAJAK. That is correct. This is quite apparent on its face.

Mr. SANTOS. We have not had the subcommittee's draft for long, but we do have a few comments, if you are interested in hearing our comments.

I might point out to the subcommittee that we did submit a bill that has the support of the administration. It varies only slightly from the version that you had previously. We are still quite happy with that, and hope that you might like to adopt it.

In any case, we have had a chance to look at the subcommittee's draft rather briefly, and we have some comments and I am sure that we will have more as this draft changes. We might have other comments.

Chairman Bingham pointed out that, or he asked, I believe, whether or not the administration had indicated a desire to grandfather in the existing uses of 5(b). I think that Assistant Secretary Katz's testimony, and Assistant Secretary Bergstrom's testimony, very clearly indicated that existing uses would be grandfathered. Whatever procedural constraints we were talking about were to be applied prospectively.

We can say more authoritatively that we would not be anxious to subject existing uses to the procedural restraints of the National Emergencies Act. As I pointed out earlier, as the language is presently drafted, it would not only terminate existing uses after the 2-year period that expired, but it would appear to require a new declaration of a national emergency, and I think that this would be a problem.

Mr. CAVANAUGH. If I could interrupt you there.

The point that I tried to raise earlier, I would appreciate it if you could present to us in specifics the justification for the grandfathering. That is, present to the committee what ongoing uses of 5(b) are currently underway to be grandfathered, and the reasons the administration feels that they must be grandfathered, or appropriately should be grandfathered.

Mr. SANTOS. I can answer that, at least, briefly.

Mr. CAVANAUGH. I would prefer a total answer in terms of each of the uses now ongoing that would be grandfathered with the justification for the grandfathering.

Mr. SANTOS. It has been pointed out to me by several of my colleagues that the testimony certainly of both the Treasury and the State Department listed specifically those uses of 5(b) that we would like to be grandfathered.

I believe that it is the second part of the question that is not answered by that testimony, and that is why we feel that they should be grandfathered. It is answered somewhat briefly in the testimony. It is indicated that the termination of the national emergency which supports those uses might well unfreeze the assets currently frozen, depriving U.S. citizens of the ability to satisfy claims that are outstanding in various instances.

I can certainly go back and find out if there are additional and more complete reasons.

Mr. WHALEN. If, however, the emergencies were extended, or declared anew, this problem would not exist, would it?

Mr. SANTOS. I believe it would not. But if a new national emergency had to be declared under all the constraints that have been placed in this staff draft, I am not certain that a new national emergency would be declared.

Mr. CAVANAUGH. That is somewhat in the nature of my interest. If, indeed, we are altering the circumstances where the national emergencies which currently exist would not—the powers pursuant to emergencies currently declared would not comply under the regulations, that is what I am interested in knowing.

Mr. SANTOS. Certainly. For instance, and I can just cite here an example, the national emergency requirements of this bill would require that the emergency arise from a source outside, or substantially outside of the United States. It is clear that at the time the national emergency was declared, which is now the basis for many of these actions, there was a source outside of the United States for the national emergency. Whether the President could make that claim today, I don't know.

Mr. MOHRMAN. If I may interject at this point, the grandfather provision as it is now written would not require that the declaration of national emergency meet the standard that we impose for declarations of national emergency under title II. All he has to do is declare

a national emergency. It does not have to be an extraordinary situation, or have a source outside of the United States.

Mr. SANTOS. I am pleased to hear that, but I am not sure it is clear from the face of this bill. As I read this bill, it requires that a national emergency be declared, and the provisions under titles 2, 3 and 4 would apply with the exception of the concurrent resolution.

On its face, it would appear to require that the procedures described in this would be followed, and that the source of the emergency must be outside the United States. If this is not the case, then there is no problem.

Mr. WHALEN. I would want the staff to get together and make certain that what we say is true.

Mr. SANTOS. In many instances, Mr. Whalen, we have been pleased to hear from the staff that what appeared to be the case, was not the case.

Mr. WHALEN. However, the Supreme Court may take a different view.

Mr. SANTOS. What we are concerned with is what 5 years hence, or 10 years hence, when we have gone on to other things, someone reading this act may read it somewhat differently than we do today.

Mr. MAJAK. We have not yet conferred with the drafter of the bill.

Mr. SANTOS. We will be interested in what the legislative history will say.

Let me just make another few comments on this bill. It was noted that there are certain procedures constraints on national emergency powers when they are coupled with armed hostilities. In other words, certain time limits must be placed on the use of national emergency powers in the use of armed forces.

The way the section 203, which contains those procedural constraints, reads, it is not at all clear that the armed hostilities have to involve the same situation with respect to which the national emergency has been declared, which raises the specter of national emergency powers being terminated automatically by the ending of the use of armed forces, and having nothing to do with the particular national emergency.

I don't know if that is the intention, but it might be read that way.

I might add also that we have not had a chance to look at section 202. I would assume that we would all feel that this is crucial, and we would want to look at that very carefully.

Also, the congressional veto of the issuance of regulations, I feel confident in saying that it is certainly inconsistent with the recent Attorney General opinion on the use of congressional vetoes in the reorganization context.

It is certainly clear from that opinion that this ongoing congressional review after the fact in the issuance of regulations, especially in an area involving the foreign affairs area, would probably be regarded as unconstitutional.

I believe that this is all I have to say about this particular bill, except that we have not had a chance to go through it in detail.

Mr. CAVANAUGH. You don't expect to be forthcoming with any more details, or a fairly more detailed position by tomorrow?

Mr. SANTOS. We can make every effort to meet within the agencies and have more detailed comments. Again, they would not purport to

be an administration position, but would purport to be an interagency—the product of an interagency discussion.

Mr. CAVANAUGH. We would be very sympathetic to that. We are aware of the constraints of time you are operating under. Any expansion of your views that you can provide us by tomorrow will be appreciated.

Mr. SANTOS. I believe that there is one further point to be made with respect to section 101(b)(2). I guess, actually, it cannot be answered until we have an interagency meeting. I think that you raised this issue.

Mr. CAVANAUGH. I want to go back just to clarify the distinction in my own mind of your earlier discussion. I am not sure that we understand.

Mr. SANTOS. Mr. Cavanaugh, I have just noticed one further comment on section 205. Again we have the problem that did appear in section 205 before, which is at the bottom of page 9. It appears that authorities which are being exercised and actions which are proposed to be exercised are distinguished. With respect to the latter actions that are opposed to be exercised, it appears that the President is required to submit a report before he can actually take this action. I don't know whether that is the intention.

Mr. MAJAK. This was brought to your attention. It envisions consultation. However, we can look at that wording again.

Mr. CAVANAUGH. Between 203 and 204, you seem to indicate that it would be your understanding that in 204(a) there would be some restrictions to foreign interest because the actions to be taken would only be taken pursuant to a purpose relevant to 203.

Mr. SANTOS. I think that this is substantially correct. My recollection of the earlier draft is——

Mr. CAVANAUGH. If I could stop you there, and perhaps have the staff address that because I would not agree with that. My understanding would be, once the authority is justified under 203, it gives rise to the powers of 204 which are unlimited, at least in 204(a).

Mr. MAJAK. It would be our judgment that while the fact of the source of the threat, and therefore the triggering authority, is strictly foreign, certainly in terms of past usages, this would not preclude the purely domestic remedies.

However, we would be willing to admit that to distinguish between a domestic remedy and a foreign remedy is difficult. There might be cases where a combination of those two could be appropriate.

Mr. MOHRMAN. I might point out that the authorities can only be used to deal with the threat. The declaration of a national emergency does not give the President the right to do whatever he wants. He can only use the authorities to the extent necessary to deal with that threat.

So there would have to be some relationship between the circumstances and the authorities which are exercised.

Mr. CAVANAUGH. My understanding is that we probably should reinsert "foreign country" in the national restrictions in 204(a).

Mr. SANTOS. Section 204(a)(ii), after banking. That is the suggestion we had.

Mr. CAVANAUGH. Then let the administration react to that further. I don't have any further questions.

Mr. WHALEN. I don't have any further questions either.

Mr. CAVANAUGH. I also have not had an opportunity to read the findings.

Mr. MAJAK. I don't have any particular comments to make other than to say that, in drafting these purposes and findings, we simply attempted to capture the broad purposes of this kind of legislation, to make it consistent with the purposes and findings of the Export Administration Act with which it is frequently used in tandem, and to transfer from the earlier staff draft some of the policy language out of the basic body of the act, and place it into the statement of purposes.

I think it reflects rather closely in many cases the actual terms of this new draft.

Mr. WHALEN. I, like Mr. Cavanaugh, have not had a chance to look at this. The ink is still wet on it. Perhaps you and Tom might want to discuss it further.

Mr. MAJAK. Anytime.

Mr. CAVANAUGH. Then we are adjourned.

[Whereupon, at 3:40 p.m., the subcommittee adjourned, subject to the call of the Chair.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

Markup of Trading With the Enemy Act Reform Legislation

THURSDAY, JUNE 9, 1977

COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met in open markup session at 2:25 p.m. in room 2255, Rayburn House Office Building, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. We will be in order. We will continue consideration of the proposed legislation dealing with the Trading With the Enemy Act. I would like to call first the executive branch to give us any further comments on the draft legislation before us.

STATEMENT OF LEONARD E. SANTOS, ATTORNEY ADVISER, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Mr. SANTOS. Thank you, Mr. Chairman.

These comments are of a general nature. They do not address specifically some of the revisions. We will be happy to do that, following these comments.

We had, after yesterday's session, a discussion of the new draft. I believe there was a unanimity of views on the subject that really this draft and the one that we received the first time yesterday raised many new issues that were not discussed at the time of the hearings, certainly not contemplated in our draft of the bill, and I think that we are troubled by not so much the subject of these new issues, but we do not know what the administration's position would be on some of them, but we are troubled, really, with the speed that they are being considered here for presentation to the full committee.

We realize you are under a time guideline of sorts. We are not sure that that deadline requires that you present a bill in such a form.

We think that, among the new issues that have been raised by your proposed draft are the issues of secondary boycotts, unilateral trade embargoes, conditional grandfathering, the so-called first amendment exceptions, the distinction between foreign and domestic powers, seizure of documents, legislative veto of regulations, to name the primary ones.

We have worked diligently on a bill that we think responds, at least, in part, to the issues that were raised in the hearings and

again, we would hope that you would look at that bill and determine whether it meets your concerns. We realize that other issues have been raised. Frankly, when we were drafting the bill, we did not realize that some of these issues would arise. That is the reason that they are not addressed in that bill.

We think also that the draft bill that you presented yesterday, the June 8 draft, is, in some respects, difficult to follow. It is somewhat convoluted and we would hope, in any event, just as a matter of form that the language could be made more simple, more clearly understandable.

You asked us about grandfathering specifically. It is pretty clear that the unilateral actions that have been taken under 5(b) in the past, the embargoes of North Korea, Vietnam, and Cambodia. Those would probably not be permissible under the current formulation of 5(b) of the draft.

Those embargoes would presumably have to be terminated. Also, the emergencies under which those embargoes are based may not be, in fact, relevant as they are used in your draft bill to the current use.

I think, to answer your question, if those uses are not grandfathered in in the way that witnesses at the time of the hearing contemplated, a good faith reading of the law would require that some of those actions terminate.

Those are the general comments that we have. If you would like me to consider any others——

Mr. BINGHAM. Go ahead with the specifics.

Mr. SANTOS. Mr. Cavanaugh, I believe, asked whether or not there were powers—you also asked if there were not powers now not exercised under 5(b), that we might wish to exercise pursuant to existing circumstances, existing embargoes.

We have reviewed the powers conferred under this draft. Frankly we believe that all the powers conferred are exercised and that there are no additional powers that could be exercised that are not already exercised. We are troubled by a number of the phrases in this bill—the phrase, for instance, on page 2 in section (1) at the top of the page that refers to the exercise with respect to a set of circumstances. Later on the reference to deal with the same set of circumstances.

We think that that is vague. We really do not know what that means. I suppose the legislative history would explain it in some detail. Does a set of circumstances mean relations with a particular country, a particular incident arising out of the particular country followed by other incidents which require a new use of section 5(b)?

That kind of problem arises. We have mentioned some others.

For instance, we think section 203, pages 4 and 5——

Mr. BINGHAM. Wait a minute. I think it would be better if we stopped and had a discussion about each particular point.

This is the grandfathering provision. You have said, as I understand it, that there is no need for subparagraph 2, that you would not be disturbed by the elimination of paragraph 2. You said earlier that you were concerned that the current embargo against North Korea, Vietnam, and Cuba could not be continued. It is not the intention in this draft to interfere with that.

If there is a problem with this language, or if there is some other problem other than the matter of provisions of redeclaration under the National Emergencies Act, which I understood the administration had no objection to, then I think that we can work it out because we are aiming at the same objective.

Mr. SANTOS. Mr. Chairman, our reading of this draft—again, it may be inaccurate—is even if the President is only required to announce that he wishes to continue an existing state of national emergency, that state of national emergency should conform in its procedural aspects to this bill.

In other words, it should be relevant to the powers which he exercises pursuant to that national state of emergency. It should not involve a unilateral trade embargo, et cetera, various conditions.

Mr. BINGHAM. Now you are referring to provisions of section 202 or provisions which apply under title II, not title I. 202 is not incorporated—I mean, we can come to a discussion on whether we want to include section 202, but that is part of title II. That does not even apply to the Trading With the Enemy Act.

Mr. SANTOS. That is an interesting development. If you are saying that the Trading With the Enemy Act, because it remains a wartime statute, is no longer relevant to the exercise of national emergency powers, is that it?

Mr. BINGHAM. No. What I am saying is that it was the purpose of paragraph (b) on page 2 to grandfather in existing uses of 5(b).

Mr. SANTOS. Therefore, those uses would not be affected?

Mr. BINGHAM. That is correct.

Mr. WHALEN. This amends 5(b), not the new title.

Mr. SANTOS. It does refer, in the latter part of that page, to "such authority being exercised in conjunction and in keeping with the National Emergencies Act," et cetera, so it is a little bit mixed, I think.

Mr. BINGHAM. My recollection, again, is that the administration witnesses had no objection providing the termination by concurrent resolution was not included and we do not include that.

Mr. SANTOS. We have no problem with the procedural requirements of the National Emergencies Act. However, we specifically stated that we felt that existing uses of 5(b) should not be subject to those requirements.

I believe, certainly I recall, the Assistant Secretary saying he thought that there were problems with some of the uses of 5(b) in the past, but we were prepared to have the National Emergencies Act applied prospectively and not to existing uses of 5(b) and I think the reason that we are concerned with that application is that it tends to raise the merits of the substance of the existing uses.

Mr. BINGHAM. We do not want to do that, at least that is my view and I think it is the view of the members of the subcommittee. I think we are dealing with a technical problem here. It is language that may create some ambiguity.

Mr. WHALEN. Could the legislative staff respond?

Mr. MAJAK. Am I correct, that the essential point here is, again, the impact of the possible meaning of "declared" on page 2, that national emergencies would have to be declared, or redeclared?

Mr. SANTOS. That was the question we discussed yesterday. My understanding is that the word would be "continued" pursuant to the language of the National Emergencies Act. The National Emergencies Act requires the President to transmit a notice stating that the national emergency is to continue, which is a little different from requiring a new declaration. You indicated you intended the word to be "continued."

Mr. MOHRMAN. The reason it may have to be "declared" rather than "continued," as I understand it, is that an emergency has not been declared with respect to Cuba. The emergency you would have to continue would be the Korean War emergency.

As I understand the way this would work——

Mr. SANTOS. That concerns us very much. If that is the intention, I think that would not be right.

As I indicated yesterday, it is difficult, considering our present state of negotiations with Cuba and other countries that the President would want to declare a national emergency with respect to those countries. It is rather difficult to imagine that. I am not saying that he would not. I think that would certainly be something not envisioned by the witnesses who appeared here.

Their perception was with respect to the 1950 emergency and the 1971 emergency, which are the only two emergencies currently being relied on for the use of 5(b), they would be grandfathered in. That term means that they would not be affected by whatever is being done with respect to 5(b), emergency powers.

Mr. BINGHAM. What is the state of facts? We have a question of fact now with respect to Cuba.

Is there an emergency that could be continued by Presidential designation pursuant to subparagraph (d) of section 201 of the National Emergencies Act? I had always assumed that there must be.

Mr. SANTOS. Again, as I said, it may be a semantic difference. I think, as you yourself said yesterday—and we raised this issue yesterday—we said that we—we said, would the word be "declared"; you said no, you intended to use the words of the National Emergencies Act.

Mr. BINGHAM. I can see the problem. I personally would not argue that we should ask or expect the President to declare, for the first time, an emergency with respect to Cuba.

Mr. SANTOS. As you can see, this raises the very issue that I raised earlier. We get into the merits of whether there is an emergency, whether that is the proper exercise of 5(b). That is why we are anxious to avoid it. I think the witnesses very clearly said that.

Whether that is right or wrong——

Mr. BINGHAM. I understand that. The administration has previously stated it does not object to having section 201(d) of the National Emergencies Act apply.

Mr. SANTOS. That section is the section that requires——

Mr. BINGHAM. An annual notice stating that such emergency stays in effect.

Mr. SANTOS. That is true. We do not mind that applied to whatever emergencies that are declared.

Mr. BINGHAM. What is the state of fact with respect to Cuba?

Mr. SANTOS. That gets us into the merits. We would like to avoid that issue. I think, frankly, in terms of getting this bill approved and passed at some stage, to the extent it does not get into substance but

limits itself to procedural issues that are clearly intended by the National Emergencies Act, that it would have a much better chance.

Mr. BINGHAM. I agree.

How can you be willing to say that the President is prepared to state, if the embargo continues at that time, that the emergency continues in effect to October 1978? You indicated that there is no objection to that, but when I asked what the state of facts is with regard to a previous declaration of an emergency you say, that raises the merits.

Mr. SANTOS. I see the problem. That statement was made, I guess, primarily directed at whether the words were "declare" as opposed to "continue." What you are saying in effect is what I have said already.

If we continue an existing state of emergency, if that is the intent here, then we have no problem. However—that is in variance with what the witnesses said. The witnesses said that they wished that there could be an unconditional grandfathering.

What we are troubled by now, is a conditional grandfathering of these existing actions. Let me retract what I said yesterday. I want to state very clearly that the witnesses intended that the existing uses of 5(b), the emergencies upon which they are based, not be subject to whatever changes were contemplated, procedural or substantive powers of 5(b). That is the clear meaning of the term "grandfathering."

I was focusing yesterday on the question of whether you really intended to require a new national emergency be declared, which I thought was different from the phrase that requires a national emergency be continued. I guess I misspoke when I said we would be prepared to have even the term as it is used in the National Emergencies Act apply.

Mr. BINGHAM. My recollection is that the witnesses indicated that they were willing to go along with the procedural requirements of the National Emergencies Act with respect to these existing embargoes. Obviously, we can check that out.

Mr. SANTOS. If I may, Mr. Chairman——

Mr. WHALEN. Did you not say that you would be willing to live with it in terms of new emergencies?

Mr. SANTOS. Absolutely. We are talking here really about the need to state that the Korean emergency remains in effect or the worse requirement that we declare that there is an emergency with respect to Cuba, Vietnam or whatever.

Mr. BINGHAM. This is the first thing I came across. This is what one witness said:

> We believe that section 5(b)'s authority resulting from the existing declarations of national emergencies now in effect should not be terminated unless or until satisfactory replacement is in effect.

Now, that clearly refers to the existence of the declarations of national emergencies now in effect.

Mr. SANTOS. As I recall that statement, the testimony was addressing the question of whether or not it would be appropriate. I have—I believe your phrase was "standard, nonemergency legislation replace the powers now exercised under 5(b)." That was not addressed

to the question of whether the procedural requirements of the National Emergencies Act should be applicable to existing uses.

Mr. BINGHAM. It did refer to the existence of declarations of national emergencies now in effect.

You seem to be hesitant to say whether or not there is a declaration of national emergency now in effect with respect to Cuba.

Mr. SANTOS. I think Mr. Katz very clearly stated—you asked him that question, and he said the basis for the Cuban embargo was the 1950 emergency.

Mr. BINGHAM. So there is a declaration?

Mr. SANTOS. Certainly.

If I may, Mr. Chairman—I do not know if that is responsive to your question—we do have a few other points.

Mr. BINGHAM. Why do you not continue.

Mr. SANTOS. In section 203 on page 4, we really think in addition to being complex in its format that it imposes a more limited emergency power when emergency powers are being used in connection with armed hostilities than when they are not.

It seems to me, and for the rest of the people in the agencies, that it is at least arguable in a situation where they are used in conjunction with armed hostilities, there is at least as good a reason for giving them the same time frame as when they are not, and if that is the case, we frankly do not see what the purpose of tying those powers is to the introduction of armed forces. They are different powers. These are economic powers; those are military powers, in some sense, and we think that they are different considerations.

Mr. WHALEN. What?

Mr. SANTOS. We do not think that there is a need for any provision in this bill that places any different procedural restraints, timewise or otherwise, on the use of emergency powers in conjunction with the introduction of armed forces. That is applicable to the absence of armed forces.

As we read the bill, if the Armed Forces of the United States are introduced and there is a national emergency in effect with respect to that situation and the war powers resolution is affected and the Armed Forces are withdrawn within 60 days, within 30 days of that time, the national emergency powers will automatically terminate unless Congress provides it otherwise, or the President declares another national emergency.

In the absence of the introduction of Armed Forces, the President could just declare a national emergency and have it in effect for a period of a year.

Mr. MAJAK. I would like to respond. I would point out to the subcommittee the restraint. That is only after the fact, after the hostilities have concluded for a period of 30 days, then the restraint comes into view, namely that the economic powers are terminated.

This is for the purpose only of assuring the reassessment of what the situation is at that point. It places no real restraint on the authorities while the hostilities are going on.

Mr. SANTOS. That is true.

Let me posit a situation in which the 60-day time cutoff occurs and the President is required to withdraw his troops and 30 days later the national emergency powers terminate.

At that point, the President is faced with the prospect of having to declare a new national emergency even though, perhaps, the dramatic circumstances are no longer in effect, perhaps making it more difficult to justify. You may say perhaps he should not declare a national emergency; my response to that, if he had not introduced the Armed Forces and perhaps the situation were not as serious, he would not be faced with this problem within 90 days, which is the shortest period—I guess it could be shorter than 90 days; certainly, as a procedural matter, 90 days. He might lose his emergency powers without declaring a new national emergency which is cumbersome.

Mr. MAJAK. My response to that, it is not our purpose here, or in the war powers resolution to turn your argument around to encourage the President to engage in hostilities without a declaration of war.

The fact that his involvement in the hostilities might cause him a subsequent policy problem with the extent to the use of economic powers, is justifiable. The reverse would be, in effect, to encourage him to engage——

Mr. BINGHAM. I do not understand Mr. Santos' point that way. It seems to me, he is saying that in this draft we give the President less flexibility if there is a case of hostilities than if there is not.

Mr. MAJAK. I would not say less flexibility. We require him to face a policy problem 30 days after the hostilities are over, a policy question if he needs to continue his economic authorities or not.

Mr. BINGHAM. That is a question that does not arise.

Mr. MAJAK. It may not arise if he does not engage in the hostilities.

Mr. BINGHAM. We will have to suspend. There is a vote.

[A brief recess was taken.]

Mr. BINGHAM. The subcommittee will resume.

I wish we could resolve this question which I have at least been in doubt about. That is it is the intention of this subcommittee, the consensus so far, that we want to grandfather in and not disturb the embargoes against Cuba, against North Vietnam, and against North Korea.

It is my understanding the administration did not object specifically to the application to section 201(b) of the National Emergencies Act to those situations which would require the President, if those embargoes continued beyond October 1978, to transmit a notice stating that the underlying emergency continues in effect.

Mr. SANTOS. We have discussed this in the interim, Mr. Chairman. I think maybe if I explain—first of all, our own proposal rather clearly indicates it was our intention to grandfather in the existing uses and not make them subject to these procedural constraints.

If you look at 202(d), it says, "Any national emergency declared by the President in accordance with this title."

Now, if that section is to apply, there must be a national emergency declared in accordance with this title. The only way for the Korean emergency, or the 1971 emergency, to constitute a national emergency declared in accordance with this title is for there to be declared a national emergency subsequent to the National Emergencies Act and that is something I do not think any of the witnesses suggested.

To do so, as I said, is untenable. It was conceded by Mr. Bergsten that certainly we would have difficulty in saying in good faith that there is a national emergency with respect to Cuba, that is a remnant of

the past, but for certain practical reasons we do not wish at this time to be forced to terminate those powers.

If this section is to apply, there must be a declaration issued pursuant to this. In that case, you would then have to continue it on a yearly basis, of course.

We, in our legislation, specifically propose that section 101(a), which is the section that terminates national emergencies automatically in 2 years—I should say the powers and authorities are terminated within 2 years. We specifically ask that the existing emergencies be exempted from that power, from that termination.

I think that is the administration's position.

Mr. BINGHAM. I think that is now clear. We will have to discuss that further. We have gone on, have we not, to a discussion of section 203. You were making the point, as I understand it that the administration's position is that if hostilities are entered into, that should not limit the President's power.

Under this proposed new International Emergency Economic Powers Act, it should be the same whether or not hostilities are entered into. Is that correct?

Mr. SANTOS. Again, I would not characterize it as the administration's position. Unfortunately, time has not permitted the administration's position on many of these issues. We noted that that is the effect of this provision. It does, in fact, place greater time constraints on national emergency powers such as ours in conjunction with armed hostilities; that is the effect. We frankly do not see the reason to do so. We do not know what the rationale is.

Mr. BINGHAM. Unless you have a further comment to make——

Mr. MAJAK. The comments that have been made on this point so stand. This is not a constraint on the uses of authority. It is only intended to assure reassessment of the necessity of the authorities after the hostilities are concluded.

I would say only one further point. I think that we have obviously tracked the purposes here of the War Powers Resolution. The general purposes of that act are to, in fact, place constraints upon a President who engages in hostilities without a declaration of war. I would think to the extent that we seem to have placed an additional constraint here, it would certainly be consistent with the purposes of the War Powers Resolution.

Mr. SANTOS. Mr. Chairman, if I may address that point for just a moment.

Again, in discussing this with the other agencies, there is a general feeling that the War Powers Resolution, the concept of the 60-day cutoff, unless Congress acts, in some respects is the concept that once troops are introduced and they remain in place for a certain period there is a snowballing effect. They remain because there are supply problems, et cetera. Congress did not want the situation to get out of hand. They wanted some cutoffs here in the absence of other action.

Section 5(b) powers are different powers. They do not involve the introduction of armed forces, do not go to the same issue to the extent those powers are exercised.

There should be a uniformity of procedures with respect to them. The National Emergencies Act offers the appropriate procedures. We are talking about national emergency powers that do not involve the

use of armed forces. Again, it is without stating a position for or against, we do not simply see the rationale for doing so.

Mr. BINGHAM. Does any member of the committee wish to comment on this point before we go on?

Would you go to the next point?

Mr. SANTOS. The next one, again, involves, we think, a new issue that really had not been discussed at the time of the hearing: the exemption for postal communications and collection and dissemination of news by the news media and uncompensated transfers of anything of value under certain circumstances.

There is a consensus that the first phrase affecting postal communications——

Mr. BINGHAM. Where is that?

Mr. SANTOS. On page 8, Mr. Chairman, section (b) (1).

We are troubled by the phrase, "which does not involve the transfer of anything of value." We are not sure that includes any form of commercial transaction.

It permits, someone noted, the mailing of a contract. While it might not be of value, in a certain sense, it might nonetheless be something we may wish to inhibit. These uncompensated transfers of anything of value, the conditions that are imposed by that struck us as not adequate.

There is a provision in here which is number 3(b), "or in response to coercion on or against the proposed recipient." Situations could be imagined in which the coercion might be exercised against the proposed donor.

We admittedly suggested that particular exception, but thinking about it more carefully we think there are additional ones.

Mr. BINGHAM. Would you suggest there are additional exceptions and can you specify what they will be?

Mr. SANTOS. Frankly, Mr. Chairman, we have not developed a list. We would be happy to work on it and try to come up with a list.

We have looked at these from the point of view of offering our general reaction and our general reaction is they are not sufficient.

Someone has indicated the transfer of money, while it might come under the language of 8(b) (1), may not come under the language of (b) (3). I am not sure how they relate.

Mr. MAJAK. Mr. Chairman, if I may, I have only one comment to make on that section and that has to do with regard to whether this issue was discussed in the hearings.

My recollection is that it was discussed—indeed, there were several proposals made, primarily by private witnesses in the hearings. But to my recollection at least, it may not have been addressed specifically by the executive branch. We provided to the executive branch at the staff level copies of all the statements of the private witnesses and invited their comments on any aspect thereof. Our feeling would be that it was addressed in the hearings, at least in that regard.

Mr. BINGHAM. Would you give us the rationale for the exemption of uncompensated transfer?

Mr. MAJAK. It was our feeling that charitable transfers of items on a person-to-person level between U.S. persons and foreign persons, even foreign persons and countries against which some of the authorities of this act may be imposed, was a form of personal communication and

contact which, in general, should not be interrupted. And so our purpose was to preserve that as much as possible subject to the cases in which it might be abused.

It is, admittedly, a very difficult area to draft and we have had some difficulty with that section.

Mr. BINGHAM. Let us go on.

I think that we ought to identify those areas of substantive difference and then get the subcommittee members here to express their opinions. We will try to arrive at a consensus on the substance; then we can leave it to the staff working with Mr. Santos and his associates to see if satisfactory language can be worked out.

We have identified several substantive questions. This, I believe, is another one.

All right. Would you proceed?

Mr. CAVANAUGH. Mr. Chairman, I am not clear on the substantive problem the administration has here. A thing of value is an inadequate qualification?

Mr. SANTOS. In No. 1?

Mr. CAVANAUGH. In (b) (1).

Mr. SANTOS. As I said, we are not sure that it necessarily covers commercial transactions, all commercial transactions.

What we are getting at here, frankly—there is certainly no objection, I doubt seriously whether there is any objection and nobody has ever expressed an objection to genuine postal, telegraphic, telephonic or other personal communication. Nobody really questions that.

What we really question is, if those words could be used to cover other activities that we think could legitimately be the subject of interference under (5) (b). What we would like to be sure of is that this language does not permit subterfuge, does not permit people to use the postal system to transfer things, even if they are not of value but may be a subject of legitimate prohibition.

We discussed, for instance, to give you another example, the collection and dissemination of news by the news media, we decided we should not raise any questions about that if it were a bona fide collection and dissemination of news. Certainly you can conjure up ways in which that phrase could be abused. I think our feeling was that if it was being abused we could say it was being abused and proceed accordingly. So we have not raised a question with respect to that phrase.

All of the phrases are difficult to really pin down, not really clear what would come under their terminology. When you say the collection and dissemination of news by the news media it is conceivable that could be used to transfer funds. You could, in effect, obtain large transfers pursuant to the transfer of film for news gathering purposes. That would have just as negative an effect on the efforts to isolate a country economically as permitting the outright transfer of funds. Again, that would seem to be an abuse of the language of this section. We think that could be handled.

Again, I think the only point—the administration again, I do not think you can characterize this as an administration position—the agencies have discussed this. The only point we are trying to make is that we are uncomfortable with these exceptions not because we are not in favor of the general purpose involved, but we hope that careful

language could be worked out that would prohibit subterfuge in one way or the other.

Mr. WHALEN. Mr. Chairman, I would ask this question. Have you checked it out with representatives of the news media on (b)(2)? It seems that they do not like to be subjected to any statutory provision because they argue, I believe, that they are free to operate under the first amendment and any statutory reference may be construed as limiting their rights under the first amendment.

Mr. MAJAK. We have not checked this provision. We can certainly do that, if you think it is advisable.

Mr. WHALEN. You might.

Mr. MAJAK. In this case, of course, a number of activities on occasion have been restrained by these authorities.

This would be intended, certainly, as a protection of their rights. We can certainly seek their reactions to these kinds of provisions.

Mr. WHALEN. Have those constraints ever been tested in courts?

STATEMENT OF RAYMOND J. CELADA, SENIOR SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Mr. CELADA. No; the only situation, Mr. Whalen, that comes immediately to mind is the one that we previously discussed of propaganda materials being sent from Hanoi to groups in this country.

A question was raised on the basis of the first amendment that such constraint was legitimate and held the procedure for requesting a license in order to obtain these materials was not an unreasonable one.

Mr. WHALEN. Have American newsmen been precluded from traveling?

Mr. CELADA. I do not know.

Mr. SANTOS. I get my information to this extent from the Office of Foreign Asset Controls. They inform me in fact the mails have never been opened without a court order or news activities have been licensed to the extent that they appear to be legitimate.

This always raises the question of should the Government be in a position to license these things? That is a legitimate question.

I do not think that the history of the application of 5(b) is replete with examples of where the Government has trampled or attempted to trample on these kinds of rights.

Mr. MAJAK. On that point, the news media, in the case of Cuba objected to the fact that they are subjected to a licensing process in order to travel to certain embargoed countries.

That was certainly a part of the exercise of the authorities.

Mr. WHALEN. Many times the prohibition was Cuba's rather than our own.

Mr. MAJAK. In some cases, it was.

Mr. SANTOS. I might add also that some of my colleagues have pointed out that we hope in drafting, for instance, that sort of prohibition on the use of 5(b) that we can keep in mind that the day may come when a trade embargo is popular. We may want to enforce it.

We recognize that trade embargoes, certainly the ones currently in existence, do not evoke great enthusiasm, but the time may come—

I am thinking, now, for instance of the enthusiasm being demonstrated to the Rhodesian embargo, admittedly under a different provision. I think this country would be appalled to think that perhaps the Rhodesian news service could operate in this country to propagandize the so-called racist regime, et cetera.

Let us look at this from the point of not this ox being gored but future oxen being gored to make sure that we write statutory language that is not too restrictive in this regard.

At any rate, that is just by way of caution, not position. I think that everybody in the agency, certainly based on the Attorney General's statement in the recent reorganization matter, the provision of the so-called legislative veto of regulations would certainly be considered unconstitutional.

You are aware of that?

Mr. BINGHAM. We will agree not to disagree on that.

Mr. SANTOS. We will not dwell on the issue.

Section 202, I heard that you might perhaps consider deleting that section. If you will, I will not dwell on it.

Mr. BINGHAM. I think that is something that we might now discuss.

You were going to say something, however, among the notes I made, you raised a question about a prohibition against a secondary boycott.

Mr. SANTOS. That apparently only appears now in the policy findings and purposes section.

Mr. MAJAK. It appears only in the policy section.

Mr. BINGHAM. Let me ask my colleagues now what their opinion on the question of the grandfathering of existing embargoes—whether they should be total and unconditional or whether they should be made subject to provisions of the National Emergencies Act, with an annual review and annual statement by the President for the continuation of that emergency.

Mr. WHALEN. I would say that it should be total and unconditional. I say it for two reasons.

First, I think Mr. Santos has a pretty good feel of the legislative climate. Perhaps we would be begging for trouble there. There are those who do support the embargo against Cuba and support the Vietnam embargo. They, therefore, would probably oppose such a position.

Second, I feel that we are dealing with the future, trying to develop legislation that would take care of future situations whereby a very nebulous statute would not, as in the past, be taken advantage of. We might as well set aside these few continuing instances and hope that they will be resolved over a period of time. It seems to me that the administration is working in that direction.

Mr. BINGHAM. Mr. Cavanaugh.

Mr. CAVANAUGH. Mr. Chairman, I would take the contrary view and would prefer that there be only a partial grandfathering. It is a difficult concept for me to work with that the administration basically can present to the Congress the proposition that these emergencies indeed do not exist and cannot be justified, but nonetheless, because of their historical evolution, they should be allowed to continue without review, indefinitely into the future. I do not think that we should minimize it in terms of the overwhelming value of this legislation.

My only restraint is if it would be destructive of this legislation. Otherwise, I think on principle it is very difficult to argue against establishing some procedure that not only deals with the future but deals with the clear absurdity that we operate in the present.

Mr. WHALEN. Mr. Chairman, may I respond, and state perhaps the same thing in a little different way. What we are suggesting is that we partially change the rules. Actions have been taken in the past under a set of, I think, lousy rules and the administration has inherited a situation which has been passed on to them.

These rules have been declared valid, I guess, under previous court interpretations. It seems to me we are putting the administration on the spot, in that respect.

Also, we are asking them to do something that they really feel they cannot justify in terms of emergency. I just feel that these few exceptions will be worked out in time and what we are really looking in terms of this legislation is the future, not the past.

Mr. BINGHAM. My suggestion is this. I think that this is a real issue and one that we ought not to try to decide at this moment. I think the full committee ought to have the opportunity to review it. I frankly do not see any danger to the legislation as a whole in proceeding with the bill substantially as it stands.

If either at the full committee level or on the floor an amendment is adopted that would, in effect, provide for unconditional extension of the grandfathering, that is not going to jeopardize the bill. I would favor our letting it go to the full committee in its present form.

At that time, we will have to discuss these pros and cons, which are certainly both valid points of view. We now understand the administration's position and that will be presented in an appropriate manner.

On the next one, which has to do with the use of a different standard in connection with the involvement in hostilities, I find myself rather sympathetic with the administration's point of view or Mr. Santos' expression of it.

Certainly, if we eliminate that as a special case, we are not providing any incentive for these hostilities. I think that it would simplify the bill. It seems to me to be a reasonable proposition that we just have the one case, which would be specified in section 203(a). That would eliminate a lot of complication here, which I frankly do not see very much value in.

Would you like to comment on that?

Mr. WHALEN. I think the point is well-taken. I concur with your views.

Mr. BINGHAM. Mr. Cavanaugh.

Mr. CAVANAUGH. I have some reluctance, Mr. Chairman. I share the staff's view. I think that I was going to suggest a longer period, of 60 days from the disengagement, because I do think you do run into psychological difficulties that need not continue if you force some confrontation of the situation for resolution in a reasonable period of time.

I think that is the circumstance that the committee was addressing itself to.

Mr. BINGHAM. It is a psychological problem that I can see arising as an incident is diminishing—the troops have been withdrawn and you

are asking the President, if he wants to continue some of these economic powers, to declare an emergency with respect to that situation.

Let us take the *Mayaguez* case. Assuming it had been thought useful at the time to have some of these powers used against Cambodia in that case, would it have made sense to say that those powers had to terminate after the troops had been withdrawn unless the President at that point declared an emergency?

Note that if we leave it in the one paragraph, he has to declare an emergency at the beginning, or at some point. The powers would flow from that, just as in any other emergency, until either discontinued by the President or discontinued by the Congress.

I can see a case where it would be troublesome and not helpful for the President to have to declare an emergency with respect to the situation as it is winding down.

Mr. CAVANAUGH. I see.

Mr. BINGHAM. If the gentleman wants consideration and offer an amendment in the full committee, we can certainly consider it at that point. I would like the two of us here to concur in this case, and I would prefer to go the route of accepting the administration's position, present the bill, have the bill accepted and go to the full committee with the simple proposition.

Mr. CAVANAUGH. I certainly will not object. The Chair makes a fine argument in that vein. It is a close call and one I don't feel strongly about.

Mr. BINGHAM. Very good.

Let us talk about section 202. My own, initial feeling is that we would be better off without 202 except for something corresponding to the language of the very last paragraph, which is No. 6, page 3, which could be worked into the text of the bill. Otherwise, I think section 202 merely would create a problem for us.

Mr. WHALEN. A narrow target, Mr. Chairman. There are a lot of "whereases" as is so often the case with many of our congressional resolutions. Those clauses usually are stricken, as should those as section 202.

Mr. MAJAK. I may point out that in this case I think the administration has provided us with some very good language on that point. It appears in the administration draft on page 6, item (c). I would propose that we take that language, or something very close to it, and try to work that into the text of the bill, if that is your suggestion.

Mr. BINGHAM. Do you have any comment on the idea?

Mr. CAVANAUGH. I am wholeheartedly in favor of it, that is, dropping section 202.

Mr. WHALEN. Just put (c) in there.

Mr. MAJAK. Not as 202, but place that requirement at the appropriate place in the bill.

Mr. WHALEN. All right.

Mr. BINGHAM. Now we come to the question of whether to include the specific protections as are stated on page 8. I had suggested a modification to the first three lines, and we discussed this yesterday. Instead of saying the authority granted by the President in this sec-

tion may not be used to regulate or prohibit, I would suggest that it read, does not include the authority to regulate or prohibit.

Now, let us first discuss the question of whether we should include some specific protections of this kind before we discuss what should be included. My own view is that there is value in this. Although it may be, at times, troublesome to some future administration, there is value, nevertheless.

Mr. WHALEN. We are talking here about first amendment rights, Mr. Chairman. It seems to me that, in the absence of specific legislation—such as we have seen in the case of civil rights—the way one can get action is through the courts. It takes a long time, and it is very costly.

I certainly go along, not necessarily with the exact language, but with the general provisions that pertain in subsection (b).

Mr. BINGHAM. Mr. Cavanaugh.

Mr. CAVANAUGH. Mr. Chairman, I have great concern about section (b), (b) (1) and (3) for maybe reasons different than were expressed, but the administration seems to think that that language would evolve too strict a standard for them. I go in somewhat the opposite direction, saying that simply restricting or making a statement of a restriction in this fashion gives bias. First of all, you are hanging your entire hat on future interpretations of the language on a thing of value, which is very tenuous, from my point of view.

I prefer to know what powers would be vested here with regard to interception in the absence of this language. Would there be none? Does this confer or restrict?

Mr. MAJAK. Our intent was that these provisions would restrict the use of the authorities otherwise granted by this act with respect to these kinds of transactions. So it protects, in that sense, the kinds of transactions described.

Mr. CAVANAUGH. In the absence of this provision, would there be authority in the pursuit of enforcement of emergency powers to intercept postal, telegraphic and telephonic and other personal communications?

Mr. MAJAK. We feel that there would be.

Mr. CAVANAUGH. Where is that authority derived from?

Mr. MAJAK. It would be exercised by, I think, interpretation. Our major source of our inference that the authority could be so interpreted is that it has been so interpreted in the past on some occasions, such as with the licensing process for newsmen who had wished to travel to some countries which are presently subject to these authorities, or similar authorities, and so forth.

Mr. SANTOS. Excuse me, Mr. Cavanaugh. It is pointed out by a colleague of mine here that it is the Trading With the Enemy Act itself in section 3(d) permitted that kind of regulated—the language is, "It is unlawful for any person except by license to transport, or intend to transport, goods to the United States, et cetera." Here we are: "For any person to consent or attempt to send or take out any letter, writing, or any tangible form of communication. It should be unlawful for any person" et cetera, any letter, writing, book, map, et cetera, or foreign communication, et cetera. It is the Trading With the Enemy Act which gives some of that authority.

Mr. CAVANAUGH. It precludes specific communications.

Mr. SANTOS. Except by license.

Mr. CAVANAUGH. That would further a purpose contrary to the emergency.

Mr. BINGHAM. As I recall, section 3 only applies to wartime.

Mr. MAJAK. That is correct.

Mr. BINGHAM. It would apply here, where the Trading With the Enemy Act would be limited to wartime.

Mr. MAJAK. Our purpose here was to make clear that, while it was permissible under the Trading With the Enemy Act in times of war, we are not contemplating it is permissible in times of national emergency under this act.

Mr. WHALEN. Could you say that again?

Mr. MAJAK. Such regulation is precluded.

Mr. CAVANAUGH. I do not think you have done that at all.

Mr. BINGHAM. If I may say so, I do not know if you noted in the proposed language that I suggested for the introductory two lines that the authority granted by this section does not include the authority to, and so on. I do not see how that can be construed in any way as a grant or anything other than a clarification of what appers on page 6.

It is true that it would be hard to read those powers on page 6 as granting the right to regulate or prohibit communications, personal communications, or interfere with the collection and dissemination of news, but with the inclusion of a clarification like this, I do not see any harm in it.

Mr. CAVANAUGH. I do prefer your language.

Mr. BINGHAM. That was the purpose of it. I did not want to say that the authority may not be used, because that implies that the authority exists but may not be used.

Mr. WHALEN. Mr. Chairman, I wonder if 5(b), as we proposed to amend it, would stand by itself under war circumstances. With the new section of law how might it be applied if subsection (b) were not included.

Apparently this is not the Trading With the Enemy Act.

Mr. MAJAK. You are speaking assuming the new statute were in place?

Mr. WHALEN. Yes.

Mr. MAJAK. How would this?

Mr. WHALEN. How would you construe it applying in the case of postal, telegraphic, telephonic, other communications?

Mr. MAJAK. With the absence of this provision, unintentionally or intentionally, control of a certain asset, for example, or transfer of assets, could have the effect of intruding or interrupting the delivery of mails, for example, or could have the effect of making it impossible for newsmen to travel to a country against which transaction controls were being utilized.

As I said, intentionally or unintentionally, as a matter of policy or not as a matter of policy, that could be the effect.

Mr. WHALEN. Let us take a situation. We are now on friendly terms with country X, but 2 years from now, the head of government of country X starts "exporting revolution." We could use this new act, but in the absence of a declared war we would not be able to utilize 5(b)?

Mr. MAJAK. That is correct.

Your question is, then, would we want to regulate?

Mr. WHALEN. Under the International Emergency Economic Powers Act, does an American citizen have a right to send letters or gifts to his relatives in country X?

Mr. MAJAK. We would contemplate with the language of (b) that he would.

Mr. WHALEN. He would.

If (b) were not present, would he?

Mr. MAJAK. He would presumably have the right, but if transaction controls were implemented in particular ways, his right might be interrupted.

Mr. BINGHAM. If I may interrupt there, I think there would be a distinction there, between (1) and (2) on the one hand and (3). It seems to me, clearly, that unless you exempt uncompensated transfers, they would be within the powers granted under section 204, transfers of property.

Mr. WHALEN. Is that not the issue?

If title II of the International Emergency Economics Act is invoked, then do you agree, Mr. Santos, that the administration would have the authority to prohibit communication between citizens of our country and the offending country?

Mr. SANTOS. Mr. Whalen, under the existing power of 5(b) it has been the position of the office that administers the power.

Mr. WHALEN. I realize.

Mr. SANTOS. My conclusion will surprise you, I think. Under the existing power of 5(b) it has been the position of the office administering those powers that they do not have power to interfere there with those kinds of transactions—I should not say transactions, communications—to the extent those communications have been interfered with it has been indirectly as a result of certain financial controls.

Mr. MAJAK. This is precisely the point.

Mr. WHALEN. Take the North Vietnamese case.

Mr. MAJAK. The point is whether or not the authority exists. There is clear evidence that the asset controls are, at times, implemented in such a way that they have an effect of inhibiting these communications. That is what we are trying to advise the executive branch to avoid.

Mr. SANTOS. Mr. Whalen, I do not know whether it would really satisfy the committee, but we, in working with the staff, proposed a kind of exemption that we thought would answer at least some of the concerns, and we tried as much as possible to reflect the language that is now in section 38 of the Trading With the Enemy Act, which refers to the donation of articles, including food, clothing and medicine, intending to be used solely to relieve human suffering.

I recognize that that would not cover the post, the mailing problem, but it would go some way to preventing interference with what might be described as humanitarian efforts.

Mr. BINGHAM. I would propose, if there is no objection, that we agree for the purpose of referral to the full committee, that we will leave in the exemptions in some form and ask the staff to see if they can work out precise language to meet the precise objections of the administration.

For example, it may be the phrase "does not involve a transfer of anything of value," perhaps could be broadened to cover the case of contracts or something else such as you referred to. But I think, again, it is a pretty important issue. I would like to present it to the full committee. I think that we can word it in such a way that it is clear that we are not suggesting any new authority but merely clarifying that we do not want this to be interfered with.

I also suggest that the language that Mr. Santos just referred to is a very clear way.

Mr. MAJAK. That only refers to (3).

Mr. WHALEN. I would agree with that, Mr. Chairman.

Mr. CAVANAUGH. I will also, for the time being.

Mr. BINGHAM. Now, I think that covers, does it not, the pertinent issues. I would ask that we try to have Mr. Santos and his associates, bearing in mind we are not committed to going along, for example, with the idea of some conditions on the grandfathering, but I think that it would be helpful to have you work with committee staff on language.

Mr. SANTOS. Mr. Chairman, we are glad to and are prepared to work with the committee staff. As we have indicated all along, this is the staff level that is working with your staff, and therefore we would certainly like to reserve an administration position.

Mr. BINGHAM. I am afraid as a matter of practical possibility that we are not going to be able to meet the June 14 deadline. That, perhaps, will relieve your mind about the pressure of time.

The full committee cannot get to this at the earliest until next Thursday.

What I would like to propose is that we have the staff draft for Monday afternoon and try, at that time, to mark it up and refer it to the full committee.

Mr. MAJAK. Just to provide more clarification to the staff, I think what we have covered is quite clear. Yesterday there were a number of tentative suggestions made relating to other portions of the bill, or other phrases of the bill, which we made notes on at the time.

I wonder whether any of those should be regarded by the staff as things to be incorporated in a new draft, or whether this list is exclusive?

Mr. BINGHAM. Some of them were included in section 102(b).

Mr. WHALEN. What was it, "extraordinary and unusual"?

Mr. BINGHAM. Yes.

Mr. MAJAK. I presume we are to follow up that the authorities in section 204(1)(a)(ii) are again to restrict banking, the phrase, "banking institutions," to transfers involving foreign interest.

Mr. WHALEN. Yes.

Mr. CAVANAUGH. That was the consensus yesterday.

Mr. SANTOS. We assume references to section 202 will be taken out?

Mr. MAJAK. Yes, of course.

In addition there was a suggestion made, Mr. Chairman, on page 5—I believe, in fact, that it was your suggestion—at the bottom (ii) in reference to the case—excuse me, I withdraw that. That is now out.

Mr. BINGHAM. We do have the problem of the present regulations being subject to congressional veto.

Mr. MAJAK. Maybe we could view what the consensus is.

Mr. BINGHAM. In general I do not like congressional vetoes where regulations are going to be issued constantly by regulatory agencies. I do not like to have the insertion of a congressional veto. But in this case, where there may be definitions, and there is presumably a one-time thing, something that is not going to happen very often, I would prefer to include the congressional veto.

Is that agreeable?

Mr. WHALEN. Yes. I had voted against the amendments, if we are going to review every regulation of a Federal agency I think it certainly would help the unemployment problem. I would need a staff of 200 doctors, physicists, engineers, architects, and so forth.

Here, however, we are dealing with national emergencies—and hopefully, we will not have very many of those. If they should occur, it does seem to me that we would want to be in a position to review the regulations dealing with the national emergency.

Mr. SANTOS. Without reiterating the conclusion I offered earlier, I would like to explain, for a very brief moment, that it seems to us that the use of this mechanism in this case is particularly unjustified. It primarily stems, not for practical consideration of how this continuing review is to occur, but the concept of the separation of powers in one branch, legislative, the other executes, and also these are national emergencies but national emergencies in a foreign affairs area, also a traditional area of Executive action.

So it is a particularly extreme case in which to have this.

Mr. BINGHAM. Mr. Cavanaugh.

Mr. CAVANAUGH. I agree to the consensus. I think it is appropriate.

Mr. BINGHAM. I think that winds us up, then, for the day. But we are not finalizing it.

Mr. SANTOS. Mr. Chairman, we have one request. If we might request, since we have submitted a bill to you from the administration we would ask that when you do send up whatever draft you finalize that you send with it the administration supported draft so that there would be an opportunity to see our efforts and our concepts.

Mr. BINGHAM. I see no objection to that being included. It will not be formally reported by the subcommittee.

Mr. MAJAK. We are taking a transcript of these markup sessions and they will be published. If it is the desire of the subcommittee the precise administration draft could be included.

Mr. BINGHAM. It is not unusual that the administration's draft bill is not the markup vehicle, Mr. Santos.

Mr. SANTOS. We do not feel badly. We are very pleased so far.

Mr. BINGHAM. Until 2 o'clock Monday, the subcommittee stands in recess.

[Whereupon, at 4 p.m. the subcommittee adjourned, to reconvene at 2 p.m. on Monday, June 13, 1977.]

EMERGENCY CONTROLS ON INTERNATIONAL ECONOMIC TRANSACTIONS

Markup of Trading With the Enemy Reform Legislation

MONDAY, JUNE 13, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
Washington, D.C.

The subcommittee met in open markup session at 2:30 p.m. in room H–236, the Capitol, Hon. Jonathan B. Bingham (chairman of the subcommittee) presiding.

Mr. BINGHAM. The subcommittee will come to order.

For the benefit of some of the members who have not been able to be present at the previous sessions of the subcommittee on this bill, let me attempt to summarize the working draft that we have been working on.

SUMMARY OF STAFF DRAFT

First of all, title 1 limits the existing Trading with the Enemy Act to situations where there is a declared war, that is for the future. With regard to those situations where these authorities are currently being exercised under the old Trading With the Enemy Act—and I might mention that the principal ones are Vietnam, Cuba, and North Korea, and the freezing of assets of a number of Communist countries, including China as well as a number of Eastern European countries—the tentative judgment of the subcommittee has been that these, in effect, should be grandfathered, subject only to a requirement that as of September of next year, which is the time at which the other emergencies that are covered by the National Emergencies Act expire, the President would simply have to indicate that certain powers which he has been exercising under the Trading With the Enemy Act are to be continued in the national interest. This is the latest of several versions that we have discussed.

We have recognized that it might be embarrassing for the President to have to declare new national emergencies with respect to Cuba and Vietnam. At the same time, if we were to take action here, in effect, terminating those embargoes, we know that this bill, which we hope will not be particularly controversial, would become instantly controversial.

So we have arrived at this proposed compromise, which I hope will be satisfactory to the administration. We would not require the President to declare that the emergency of 1950, under which those powers are now being exercised, continues; we would simply require him to

state, beginning in September 1978 and annually thereafter, that such powers are continued in the national interest.

There are also certain other minor changes in the Trading With the Enemy Act. On page 3 of the draft bill, the criminal penalties are increased in accordance with the administration's recommendation, and in accord with the Export Administration Act.

Title 2 provides for the future, for international emergency powers other than those arising during a declared war. You will see that the President has substantial authority to declare an emergency where there is, according to the language at the top of page 4—

> Unusual and extraordinary threat which has its source in whole or in substantial part outside the United States, to the national security, foreign policy, or economy of the United States.

If the President so declares a national emergency, he then has the powers specified under section 203. Those powers are substantially the same as what he now has under the Trading With the Enemy Act with certain important exceptions. They would not include the power to vest property or take title to property. They would not include the power of bullion and currency.

Mr. MAJAK. It would not apply to purely domestic credit and banking transactions.

Mr. BINGHAM. There are, then, certain reporting requirements.

There is another exception. The President would not have the power to seize records, but he would have the power to require that the records be produced. That is on page 6.

There are certain protections provided on page 7. The authority does not include the authority to regulate or prohibit directly or indirectly any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; the collection and dissemination of news by the news media; or uncompensated transfers of anything of value with certain exceptions, at the President's discretion.

We had some differences between the representatives of the administration in regard to those protections. They feel that they are not necessary, or perhaps in the case of uncompensated transfers, they might be inconvenient. The subcommittee, so far, feels that there should be explicit protections of those items, particularly of (1) and (2), and probably (3) also.

Section 204 provides for consultation and reports. Section 205 deals with regulations and definitions. Here we do run contrary to the view of the executive branch. We provide for congressional review of those regulations, the reason being that in the past definitions have been used that were very broad. For example, President Roosevelt defined banks to include virtually private financial institutions. We don't expect these regulations to be issued constantly. I have not been one of those who has favored the congressional review of all regulations by any means, but these seem to be important enough so that they should be subject to congressional review.

Of course, the administration maintains its opposition to the concurrent resolution veto. The penalties are the same in title 1.

Title 3 covers certain amendments to the Export Administration Act, which are necessary. In the past the President has relied on powers

of the Trading With the Enemy Act to apply the controls of the Export Administration Act to subsidiaries of the United States operating outside the U.S. territory.

If those are to be continued under the Export Administration Act, and the Trading With the Enemy Act is to be phased out, then the Export Administration Act has to be amended accordingly.

Now we would like to agree on this bill and the variations thereof. Then immediately introduce the bill, listing those members who would like to cosponsor it. I will sponsor it. We are scheduled to have it before the full committee on Thursday and Friday.

Before we break up and lose our quorum, I have another matter that I would like to bring up, on which I would like to be sure that we have a vote. However, it is another matter.

First let me ask Mr. Majak if I have fairly summarized the bill.

Mr. MAJAK. Mr. Chairman, you have fairly covered the bill, and I have nothing to add.

Mr. BINGHAM. I think that I have also summarized the position of the administration, at least representatives of the administration. It has been made clear to us that they are not here speaking for the administration in the formal sense, but several agencies have been represented here and have given us their reaction.

We have tried to heed them in major ways. The major problem would be the congressional veto, which we simply cannot resolve. We have also modified the provisions for grandfathering of existing embargoes, and so on, in a way that I would hope would be reasonably satisfactory to meet the objections of the representatives of the administration, which they previously raised.

STATEMENT OF LEONARD E. SANTOS, ATTORNEY ADVISER, OFFICE OF THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

Mr. SANTOS. Mr. Chairman, thank you.

I have seen this handout, which I gather is to be inserted on page 2, section 101.

Mr. MAJAK. Mr. Chairman, this new section has not been handed out because it was drafted at Mr. Whalen's request. Mr. Whalen has not yet arrived, and we are not completely certain that he has even had an opportunity to see this language. That is the reason that it has not yet been circulated.

Mr. BINGHAM. Supposing that you read that aloud?

Mr. MAJAK. We have copies.

Mr. BINGHAM. Then, let us distribute those copies and explain where this fits in.

Mr. MAJAK. On page 2, subparagraph (b), it deals with the grandfathering mechanism. The problem arises in making the existing usages subject to the terms of the National Emergencies Act. One of the terms of the National Emergencies Act is that all authorities being exercised will terminate in September 1978, unless a new emergency is declared for the purpose.

The prospect of the President having to declare a new emergency with respect to some of these existing uses, such as Cuba, Vietnam, and others, if those uses are still in place by September 1978, does pose a diplomatic, or potential diplomatic problem.

Therefore, we have attempted, in this revised language, to provide for the continuation of those authorities without the necessity to declare or redeclare a national emergency, and to make the continued use of those authorities, after September 1978, subject to annual periods of review and reassessment, and continuation if the President so desires, which is a mechanism already in the National Emergencies Act.

So the language that the subcommittee now has before it, dated June 11, is an effort to provide for the continuation of these existing authorities without the need specifically for a declaration or redeclaration of national emergency.

Mr. BINGHAM. I might just add that at our last session we had a difference of opinion in our subcommittee. Mr. Whalen favored language such as you have on the new sheet, and Mr. Cavanaugh favored something a little bit more like the existing language.

Mr. Cavanaugh has indicated that this language is acceptable to him—I think that it would be satisfactory to Mr. Whalen. It is certainly acceptable to me. I can see the disadvantage to require either the declaration of a national emergency in September of 1978, or a statement continuing the 1950 emergency, which would just perpetuate the phoney emergency quality that now exists in the Trading With the Enemy Act.

Mr. FINDLEY. Does this sanction the phony character of the emergency?

Mr. BINGHAM. It simply grandfathers in those powers which are now being exercised, but gets away from the fact that they rely in any way on the emergency declared in 1950.

Mr. FINDLEY. I share the concern of Mr. Cavanaugh, at least as I understood it. It seems to me that September of 1978 is far enough in the future that the administration ought to be able finally to terminate this state of emergency.

I cannot see any justification for the administration's reluctance to resume normal trade relationships with these countries. Congress is giving the administration an easy way by allowing it to stretch out the present relationship.

Mr. BINGHAM. Let me say that in substance I agree with you. I would like to see both of those embargoes terminated, as far as Cuba and Vietnam are concerned, certainly. But it has been the consensus of the subcommittee up till now that this is not to be a vehicle in which to try to cross that bridge.

This is essentially an act trying to clear up the mess that the Trading With the Enemy Act has left us in. We can always move on the front of Vietnam or Cuba. Hopefully, the administration will.

However, to get this through in reasonably good form, we would like not to raise that particular controversy. That has been my view, and I hope that we would not attempt to have a confrontation on that particular subject.

Mr. FINDLEY. Supposing there arises another situation that the administration would seek to blanket under emergency powers. Could it not use the existing declaration of a state of emergency to deal with that new situation? Then have the escape clause that is set forth in this amendment as a way to avoid the confrontation of the basic issues, as we avoided the confrontation in Cuba?

Mr. BINGHAM. We could deal with that. First of all, this extension does limit it to powers exercised on the day of enactment of this act. It might be wise to have that being exercised on today's date, so that there are no gaps between today's date and the enactment of this act.

Mr. FINDLEY. That would be better.

Mr. BINGHAM. I think that it would be protected against that. I don't see any difference, really in saying—we are talking about grandfathering existing situations, and we have no intention of grandfathering additional acts that may be taken in the next few weeks.

So I would personally favor the grandfathering of any authorities that are being exercised as of the date the subcommittee takes action, which would be the beginning of some kind of alert.

Mr. FINDLEY. The question still in my mind is the extent to which the declaration of the emergency related to Cuba and to Vietnam may have a sufficiently broad scope, where the administration would not have to say who in order to deal under that same old declaration of emergency, and with a new emergency problem.

Mr. BINGHAM. I will ask the staff to comment on that. My impression is that it would not.

Mr. MAJAK. I am just looking to refresh my own memory. Between now and 1978, could a President undertake additional actions under the existing 1950 or other declared national emergencies? My impression is, yes.

The National Emergencies Act does not restrict that until September 1978. Is that your understanding, or the understanding of the administration?

Mr. SANTOS. No; actually, I must state that it is not my understanding. My understanding is that if section 5(b), or the International Economic Emergencies Act is used as a basis for future action, it would have to conform to the procedural restraints of that act.

If the President claims that he must do something new with respect to Cuba, or new with respect to Vietnam, that, of course, is automatic.

Mr. MAJAK. I was speaking to an entirely different situation than one of the existing usages.

Mr. SANTOS. My understanding is that once this law replaces the old law, nothing can be done pursuant to the authorities of 5(b). It would have to be pursuant to this legislation.

Mr. MAJAK. This new law applies the procedures to National Emergencies Act. The question, therefore, becomes——

Mr. BINGHAM. I don't think so. Page 1, the very first section, section 5(b)(1) of the Trading With the Enemy Act is amended in this way on the date this act becomes effective.

Mr. SANTOS. Exactly. Once this bill becomes law, section 5(b) will no longer provide authority in times of national emergency. So if the President seeks to take new national emergency action, he would have to take it under this new bill.

Mr. IRELAND. With the exception of those that are grandfathered under the bill. Let me ask this. Let us say Cuba is grandfathered in under that—again I would prefer today's date instead of whatever date in the future—could that grandfathered authority be broadened out from—Cubans have troops in Angola. Is that what you meant?

Mr. FINDLEY. That is a possibility. Would you address yourself to that. In other words, would those grandfathered ones then be spread

out to cover just a tremendous wide spectrum? The Vietnam one could end up covering all of Southeast Asia.

Mr. SANTOS. Of course, if there is an administration that wishes to act in bad faith, Mr. Ireland, I think that it would be difficult to write any law that would really tie their hands. I think that construing this language on its face, good faith, it would be very difficult for the President to use emergency powers with respect to a new country, or with respect to a situation that did not exist at the time this law goes into effect.

I think that it would be very difficult to argue that this is somehow included in the existing powers. Some administration might try to make the argument, but in good faith, the language as it now reads, it would be very difficult, certainly, to exercise emergency powers after this legislation becomes law, certainly with respect to a new country.

Mr. BINGHAM. Look at the language at the top of page 2, "The authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act, which are being exercised." Those authorities which are being exercised with respect to a country on June 1, 1977, may continue to be exercised with respect to such country.

That language remains in there. I don't see how that would permit the President either to use it with respect to other countries, or with respect to——

Mr. SANTOS. I must say, Mr. Chairman, that I agree with that. I don't think that the language could be interpreted any other way.

Mr. BINGHAM. We should have the staff look at it again. It is clear what the subcommittee wants to do.

Mr. FINDLEY. I have a suggestion on that, Mr. Chairman. If we are talking about Vietnam and Cuba, and only those two countries, and North Korea——

Mr. MAJAK. There are other uses. There are other Eastern European countries and China and Cambodia. You will find in your file a summary of the seven or eight uses. There are more than the two you have mentioned. There are six or seven countries with which one or another of these authorities is being used.

Mr. FINDLEY. Mr. Chairman, my comment, here again is that we should seize opportunities to tighten up on the extension of the executive branch authority. Maybe the best way to deal with this is to set forth in greater detail the intention of the subcommittee in the committee report, and actually enumerate the countries and circumstances. To convey in that language the sentiment of the subcommittee that they should be tightly construed.

Mr. BINGHAM. May I suggest this as a procedural action. We do have a quorum here. We may have difficulties holding it. What I would like to propose is that we make the changes that we have outlined, that we report out this bill, and any member wishing to do so, is free to offer amendments in the full committee, when it reaches the full committee.

The full committee, after all, has not been briefed on this at all. We are going to have to spend a day, or a day and a half on that. If Mr. Findley wants to offer language in which he feels protections can be improved, I certainly would want to consider it.

I must point out that under the National Emergencies Act, we are supposed to have the report of the full committee by June 15, which

is Wednesday. We are going to miss that deadline by a few days. But I would like to come as close to that deadline as we can.

For that purpose, I would like to report this bill today. We have spent several days on this with the members of the subcommittee who have been able to attend, and I think that we now have pretty close to consensus among those members. I would like to proceed.

Mr. FINDLEY. May I ask one further question, Mr. Chairman? I am perfectly agreeable with your outline.

In title 3, does the language there convey any authority to the President over exports which he does not now enjoy?

Mr. BINGHAM. The answer to that is, "No."

Mr. MAJAK. This simply changes from one statute to another.

Mr. FINDLEY. No extension whatsoever?

Mr. MAJAK. The same authority as now, but put into a statute where they belong.

Mr. BINGHAM. There is one other provision which I have not discussed, which has been drafted by staff since we last met.

Mr. WHALEN. Mr. Chairman, before we go on, what is the status of the proposed amendment to page 2?

Mr. BINGHAM. It was agreeable to me and to Mr. Cavanaugh, and I hope to others who have not had as much chance to review it. It meets your problem, I think, and it largely meets the concerns of the representatives of the administration, because you don't have to declare an emergency, or continue the phony emergency, the President simply has to say that in the national interest these authorities should be continued, and do that annually.

Mr. WHALEN. Have we acted on it?

Mr. BINGHAM. No, we have not acted on it.

Mr. WHALEN. I would suggest that it be acted on before we adjourn today. I was afraid that we would hold it for the full committee.

Mr. BINGHAM. We will act on it. There is also another amendment which I would like to have read.

Mr. MAJAK. That provision is before the members. It is entitled "Savings provisions," section 208, and it is on a separate sheet. It should be in the members' folders.

Mr. BINGHAM. Would you explain this, please?

Mr. MAJAK. Mr. Chairman, the question arose, raised in part by the administration draft which had a provision roughly of this sort. What happens to frozen assets, assets of a foreign country that are frozen under a variety of circumstances, if the authorities under this act are terminated.

The provisions of the National Emergencies Act, presumably, would terminate the authority of the President to continue to freeze the assets of a foreign country even if, for example, there were American claims outstanding.

Indeed, one of the reasons why Presidents have continued states of national emergencies for long periods of time in some cases, has simply been to continue to have available the authorities to freeze the assets of foreign countries pending settlement of claims.

We, therefore, thought that the subcommittee should address the question as to whether there should not be some saving provision, some passthrough, if you will, of the authority to continue to hold frozen assets even if you terminate the national emergency, pending the settlement of claims.

So we have drafted that kind of a savings clause, keyed to our staff draft. This savings provision would allow a President to continue to freeze foreign assets that were frozen at the time the national emergency was terminated, whether it was a grandfathered national emergency, or a national emergency declared at some future date.

So this is the thrust of section 208.

Mr. BINGHAM. That applies to assets of China, Cuba, and Czechoslovakia.

Mr. MAJAK. It is identical. This would enable the assets, for example, of China to continue to be frozen as they presently are, even if whatever national emergency is the basis for that freezing of assets, were terminated.

Mr. SANTOS. Mr. Chairman, we have only one comment and it is of a technical nature. If the subcommittee wishes to adopt the amendment on page 2 which we discussed a little earlier, it may be superfluous to have the savings clause with respect to those authorities, since presumably the President could continue to exercise the authorities under existing national emergencies without continuing the national emergency itself.

The savings clause enables him to do that with respect to existing emergencies.

Mr. BINGHAM. That is true, but that also, as I understand it, would provide for a limitation of powers to freezing assets at the end of another emergency.

Mr. SANTOS. Certainly, the first clause, (a) (1), would be useful, and I don't mean to say that it is not. It is only 208(a) (2) that is superfluous. I have only seen this for a few minutes, but it would appear to duplicate the powers contained in sections 101(a) and 101(b) as amended.

Mr. BINGHAM. Do you want to comment further on the proposed amendment to section 101(b), page 2?

Mr. SANTOS. It is certainly an improvement, Mr. Chairman, over what is currently on page 2. I think that it would go a long way to alleviating the problem that we feared, which we mentioned here earlier.

Mr. BINGHAM. I think we are ready to mark up this draft, unless there are additional questions.

Mr. WHALEN. I heard Roger's comments on section 208, the use of that, and the fact that 208(a) (2) might be redundant.

Mr. MAJAK. They might, in fact, be redundant. I think the President by his own actions may terminate a national emergency. It might be said that he could continue the asset controls. I don't know. I have just been confronted with this question.

Mr. SANTOS. By the way, we are not anxious, of course, to delete powers that you want to give us, but it does seem to be redundant.

Mr. BINGHAM. Supposing that we leave this question, which is essentially a technical question, to the staff. If they decide that it is redundant, it could be easily omitted at a later stage.

Mr. CAVANAUGH. If we might approach it some other way. If we left page 2 as is, and adopted 208, would that create an acceptable situation to the administration? It certainly would be more pleasing to me.

Mr. BINGHAM. As I understand it, 208 would not involve the embargoes.

Mr. MAJAK. Section 208, if the language on page 2 remained the same, would not alleviate the problem of the President having to redeclare a national emergency, which is the essential problem, I think that has been raised with respect to page 2.

It would alleviate the problem in the sense that he might no longer have reason to continue the national emergency, since he would have the authority to continue to freeze assets. But there are other authorities being exercised with regard to Cuba and Vietnam.

Mr. FINDLEY. Would you list those?

Mr. SANTOS. They are essentially transaction control regulations to the extent that the transaction involves a transfer of assets, it would involve the travel to those countries and the exchange of goods. Those are powers being exercised under 5(b), and this is considerably more extensive than the freezing of a bank account or a piece of property.

Mr. FINDLEY. I strongly prefer the alternative the gentleman suggests.

Mr. BINGHAM. Let me suggest that this alone would not do what we really want to do, and leaving it in, on the other hand, would not be redundant because if it is left in, the adminstration could move from a situation where there is an embargo, to a situation where there is simply blocked assets with respect to Cuba.

It separates the two types of controls at this stage, and without a thorough consideration of it, I would be reluctant to rely solely on section 208(a). The majority, at least, felt that it was necessary.

Do you want to comment on that?

Mr. WHALEN. No.

Mr. BINGHAM. I suggest that we move, then, to the first amendment, which would be on page 2, line, and I would say that this is Mr. Findley's amendment, to change the words "the date of enactment of this Act," to "June 1, 1977."

Mr. FINDLEY. I think that this is an improvement, but it does not go as far as I would have hoped.

Mr. BINGHAM. Mr. Whalen, would you move the amendment to page 2?

Mr. WHALEN. So moved.

Mr. BINGHAM. All those in favor of the amendment——

Mr. CAVANAUGH. I would like to ask a question on the amendment requiring that the President extend the exercise of the authorities for a 1-year period upon determination that it is in the national interest of the United States. Do we understand this to be a reporting requirement to the Congress, that is something short of a justification of the continuation of the national emergency?

Indeed, the national emergency would expire, but it would entail an obligation upon the President to present a justification for the continuation of the powers?

Mr. BINGHAM. That is my understanding, and that is the way it is going to be stated in the report.

Mr. CAVANAUGH. On that basis, then, I would find that amendment acceptable, assuring that some justification for the continuation of the exercise of powers would be encumbent upon the President in order to effectuate this continuation.

Mr. FINDLEY. Some new justification, would you express it that way?

Mr. CAVANAUGH. Some justification.

Mr. FINDLEY. I think I am the lone minority here. The administration, on a bipartisan basis, has been putting off the settlement of emergencies like Romania and the Eastern European countries. As long as it is easy to put it on the backburner and leave it there, it is going to stay there. Here is just such another opportunity.

If it could be required that the administration set forth a justification for the extension, some new development that justifies an extension, it would make it a lot better.

Mr. BINGHAM. I thought that we agreed on that.

Mr. FINDLEY. That is what I would like to see in there.

Mr. WHALEN. Romania, I don't think that this comes into play. You are speaking of Czechoslovakia, and that is another political issue which is different from the Trading With the Enemy Act, even though the authority contained in that act is used.

Mr. FINDLEY. On the face it looks offensive to me, considering that we have a state of emergency with Czechoslovakia.

Mr. WHALEN. We had that almost resolved, but for one attorney who had a friend in the Senate.

Mr. CAVANAUGH. My understanding is, Mr. Findley, that the acceptance of this amendment would create a circumstance that at the expiration of the 2-year period, these absurd or hypocritical national emergencies would expire, would terminate. We would, then, move into a situation where powers sought to be continued, that is embargo of Vietnam or Cuba, the President would have to present a justification for that to the Congress in terms of why the national interest required this continuation of exercise of these powers, in the absence of the national emergency that had expired.

I understand it in terms of the fact that the President would have to present his understanding of why the national interest requires the continued exercise of powers previously exercised under 5(b).

Mr. BINGHAM. I suggest that such an expectation would be included in the report, that it would be explanation for the act the President is taking. It is not my understanding that it would require the statement of some new development.

With those commentaries, could we have a vote on the amendment?

Mr. CAVANAUGH. I have one more comment, to ease my own understanding. My understanding is that this is an improvement because today we have no justification for the continuation. We have no articulation of it. This would, at least at some point, require a restatement.

Mr. FINDLEY. It is.

Mr. BINGHAM. As I commented the other day, the administration has inherited a situation, or a set of situations which stem greatly from this Trading With the Enemy Act. I think that to pull the rug from under them at this time would not be in our best interest.

I think also we would be in a difficult situation to say that there is a national emergency situation. This, it seems to me, represents an acceptable compromise.

Mr. IRELAND. Mr. Chairman, I would say that this sounds a lot like the arguments about water projects. When is a good time? I associate myself with Mr. Cavanaugh.

Mr. BINGHAM. All those in favor of the amendment, signify by saying, "aye"; opposed, "no."

The ayes have it. The amendment is agreed to.

The next amendment is the addition of section 208. Would somebody care to move that amendment?

Mr. WHALEN. I will move it, Mr. Chairman.

Mr. CAVANAUGH. I have one question, Mr. Chairman. Would it be the understanding, and I have not discussed it privately with the chairman, that section 204, the reporting requirements, would apply to the requirements of section 208, that is to say, either at the expiration of the national emergency, or the ending of the national emergency, the President would continue to exercise freezing asset powers conferred by 208 in the absence of a national emergency?

Would the reporting requirements that he present his reasons and justifications, as required under 204, be applicable to this section?

Mr. MAJAK. We feel that it is unclear, and that it probably would not be unless it were so stipulated. But if it were so stipulated that provisions of section 204 were relevant, some of the specifics of section 204 do not particularly make sense with respect to section 208, which raises, perhaps, a minor problem.

So there would be two alternatives, I think. We could either make reference to section 204 being applicable, even though the terms of 204 are emphasized with respect to 208; or we can write a simple reporting requirement in section 208 itself.

Mr. CAVANAUGH. I would move an amendment to the amendment, to require a simple reporting requirement.

Mr. MAJAK. This is some language we drafted.

Mr. CAVANAUGH. This language would be acceptable. I would propose this amendment to the Whalen amendment. Add to section (2)(e):

If the President uses the authority of this section to continue prohibitions on transfers involving funds and property interests, he shall report to the Congress every six months on the use of such authority.

Mr. BINGHAM. Would someone care to move the Cavanaugh amendment to the Whalen amendment?

Mr. FOWLER. Would that be the same requirement we are putting under 204?

Mr. BINGHAM. It is less elaborate.

Mr. MAJAK. It is less specific.

Mr. BINGHAM. Is there further discussion?

All those in favor of the Cavanaugh amendment signify by saying, "aye"; opposed, "no."

The ayes have it. The amendment is adopted.

The vote occurs now on the Whalen amendment.

Mr. FINDLEY. Mr. Chairman, may I ask a question, please? In the event that this amendment should not become law, what recourse would our Government and private interests in this country have to protect their claims? Would they not be able to go to court and impound properties or accounts until such a settlement occurs?

In other words, how essential is this amendment?

Mr. MAJAK. In the absence of this amendment, it would intrude upon the legal basis for their claims as a practical and political matter. How-

ever, it would remove from the President one of the major bargaining chips, if you would like, for settlement of those claims; namely, the ability to continue to control the frozen assets of the country involved.

So it would remove not a legal power, but a political power to help achieve a settlement.

Mr. SANTOS. Nobody may file a claim against the property of a foreign national under normal circumstances in the absence of some allegation that that foreign national owes the person filing the claim something.

The mere fact that a foreign country has expropriated American property does not create a right for all Americans to claim against a foreign country, or the property of foreign nationals of that country.

So the power of a government to freeze property is much broader than whatever legal rights individuals may have to satisfy their claims against particular individuals.

Mr. BINGHAM. Those in favor of the Whalen amendment, as amended, will signify by the sign of "aye"; opposed, "no."

The ayes have it. The amendment is adopted.

I have no further amendments. Does any member wish to propose additional amendments?

Mr. MAJAK. Mr. Chairman, do we understand that staff should look at the question of whether section 208(a)(2) is or is not redundant, and make technical corrections accordingly?

Mr. BINGHAM. That is correct.

If there are no further amendments, I would entertain a motion that the bill be reported favorably to the full committee.

Mr. WHALEN. Mr. Chairman, would a clean bill be introduced?

Mr. BINGHAM. As I said before you came in, as soon as it is voted, we will have a bill prepared and introduced today with such members of the committee who wish to cosponsor. The staff will consult with members of the committee who would like to be on it as cosponsors.

We have the full committee scheduled to take this up on Thursday and Friday.

You would so move it?

Mr. WHALEN. I would so move.

Mr. BINGHAM. Those in favor of the motion signify by saying "aye"; those opposed, "no."

The ayes have it. The motion is carried.

Now we have one further item of business. I will quickly read the statement, while we have a quorum here. The next item on the subcommittee's agenda is concerned with computer sales to the Soviet Union. Of all the products we export to the Soviets, computers probably raise the most troublesome national security implications.

Soviet computer technology is far behind ours, and naturally this is an area where our businessmen want to exploit their competitive advantage and gain access to the Soviet market. But a computer which is sold for peaceful purposes might be diverted to military uses, and might contribute to raising the general level of Soviet technology to the detriment of our national security.

As members are well aware, this issue has surfaced recently in press reports of the proposed sale of a powerful Cyber 76 computer to the Soviet Union. Many of our colleagues have expressed serious concern

to me over this sale, and have asked that the subcommittee look into the matter in order to insure that the national security is being adequately protected.

The subcommittee has jurisdiction over the Export Administration Act, which authorizes the President to regulate exports on various grounds including national security. An elaborate licensing process has been established to carry out the purposes of that act, and one of the subcommittee's major responsibilities is periodic authorization and oversight of that process.

The Subcommittee on International Trade and Commerce conducted extensive hearings in the 94th Congress on the general subject of export licensing of advanced technology. The time is now propitious for us to look in some depth at this particular troublesome aspect of that subject.

I am today issuing invitations to the Departments of Commerce, State, and Defense to appear at a hearing as soon as possible. A representative of the Control Data Corp., which is seeking to export the Cyber 76, is also being invited. I intend in that hearing to use the proposed sale of the Cyber 76 as a case study of the broader issue of computer sales.

Most of the information regarding the proposed sale is either classified or confidential. Accordingly, it is my intention to hold the hearing in executive session. Under the rules, a quorum is necessary for a motion to go into executive session, and a rollcall vote is in order.

In view of the fact that we now have a quorum, I hereby move that we go immediately into executive session at the next meeting of the subcommittee, at a time to be announced, for the purpose of taking testimony on the subject of computer sales to the Soviet Union.

Mr. WHALEN. I will so move, Mr. Chairman.

Mr. BINGHAM. A rollcall is in order.

Mr. MAJAK. Mr. Bingham.

Mr. BINGHAM. Aye.

Mr. MAJAK. Mr. Ireland.

Mr. IRELAND. Aye.

Mr. MAJAK. Mr. Fowler.

Mr. FOWLER. Aye.

Mr. MAJAK. Mr. de la Garza.

[No response.]

Mr. MAJAK. Mr. Cavanaugh.

Mr. CAVANAUGH. Aye.

Mr. MAJAK. Mr. Whalen.

Mr. WHALEN. Aye.

Mr. MAJAK. Mr. Findley.

Mr. FINDLEY. Aye.

Mr. BINGHAM Thank you very much for your attendance. The subcommittee is adjourned.

[Whereupon, at 3:30 p.m., the subcommittee adjourned subject to call of the Chair.]

APPENDIX 1

COMMENTS OF THE DEPARTMENT OF STATE ON PROPOSALS OF PRIVATE WITNESSES

DEPARTMENT OF STATE,
Washington, D.C., May 10, 1977.

Hon. JONATHAN B. BINGHAM,
Chairman, Subcommittee on Trade and Commerce, Committee on International Relations, House of Representatives

DEAR MR. CHAIRMAN: We have prepared the following comments on proposals made by the seven private witnesses in response to your request during the April 26 hearings on H.R. 1560, a bill to repeal the Trading With the Enemy Act and on H.R. 2382, a proposed Economic War Powers Act.

The proposals of these seven witnesses fall into two major categories, criteria for emergency actions and Congressional oversight.

Ideas for criteria for emergency actions include general conditions, linking each new measure to a new emergency declaration, high level economic policy review within the Executive Branch, relating the extent of action to the severity of the emergency, prohibiting use of Section 5(b) for export controls, limiting extraterritorial controls, and limiting peacetime controls on commerce to controls on the export of strategic and scarce commodities and to sanctions approved by international bodies.

Various suggestions were made that conditions should be specified which would warrant the use of Section 5(b) authorities. Examples given were extraordinary situations where there was a need to protect the national security, the national economy, and the international financial system. Such conditions correspond roughly to those which have in the past triggered the use of Section 5(b). Efforts to define conditions for declaring national emergencies were abandoned in connection with the National Emergencies Act. Any renewed effort should take into account the need for a formulation broad enough to cover unanticipated types of emergencies.

Mr. Lowenfeld recommended requirements that new measures be linked to a stated emergency and be based on a new declaration of emergency. We concur.

Mr. Stanley recommended that CIEP or some similar body be required to review the matter before emergency actions were approved. We agree that a high level well-coordinated economic policy review is necessary before new measures are approved.

Several witnesses suggested that the extent of the action should be related to the severity of the emergency. The Congress might wish to consider amending Section 5(b) to require a finding by the President that one of several specified conditions exist as a justification for invoking its powers. For instance, situations which might be regarded as less severe than a "national emergency" and therefore warranting less extensive action than called for by a "national emergency" might include any emergency relating to only one foreign country or to a specific economic crisis.

Mr. Metzger suggested that Section 5(b) should not be used for export controls. We agree that a preferable alternative would be a permanent Export Administration Act.

Mr. Lowenfeld and Mr. Stanley proposed that extraterritorial use of Section 5(b) authorities be limited. Mr. Lowenfeld proposed that extraterritorial controls be limited to U.S. citizens acting in an individual (as contrasted with a managerial) capacity and to operations plainly designed to avoid controls applicable in the U.S. It seems to us that effectiveness of U.S. control rather than the question of whether a U.S. citizen was acting in an individual or a managerial capacity should be determining. All extraterritorial controls have been designed to prevent circumvention of controls applicable in the U.S. Mr. Stanley suggested

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that controls normally not extend extraterritorially, except in exceptional cases for which there would be advance consultation with the other governments affected. We agree that extraterritorial controls should be applied in only exceptional circumstances. Since many third countries are affected by such controls, advance consultation with all of them would not be practical. We do agree that consultation with those most affected is wise.

Mr. Weiss proposed limiting peacetime controls on commerce (other than controls on the export of strategic or scarce commodities) to sanctions approved by international bodies. While we believe that we should cooperate with UN agreed sanctions, we also believe that the U.S. should retain freedom to determine, in the absence of action by an international body, that an emergency exists which affects U.S. interests seriously enough to warrant peacetime controls on commerce.

Suggestions for closer Congressional oversight included concurrent resolutions to terminate controls, time limits on embargoes, consultation with Congress, and reporting requirements.

We see constitutional problems in concurrent resolutions to terminate controls.

We can agree to a legislated annual limit on each national emergency unless the President makes a specific determination that such emergency is to continue in effect (along the lines of Section 202(d) of the National Emergencies Act). However, we believe that legislated time limits on embargoes, or other measures which might be taken pursuant to an emergency, would be unwise. For instance, an arbitrary date for terminating an embargo might come at an inauspicious moment during the course of negotiations to normalize relations with the country with which trade was being embargoed.

The need to act quickly in emergency situations may on some occasions make prior consultation with Congress impossible. Accordingly, while we agree that Congress should be consulted on these matters, we think it would be unwise for legislation to require consultation prior to taking the emergency action.

We concur, in principle, with the idea of reporting to Congress and, specifically, with the reporting requirements set forth in Section 401 of the National Emergencies Act.

Sincerely,

JULIUS L. KATZ,
Assistant Secretary for
Economic and Business Affairs.

APPENDIX 2

ARTICLE ON TREASURY REGULATIONS OF FOREIGN ASSETS AND TRADE FROM "A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS," VOLUME I, CHAPTER 7*

(By Stanley L. Sommerfield Acting Director, Office of Foreign Assets Control, U.S. Department of the Treasury)

SECTION 7—TREASURY REGULATION OF FOREIGN ASSETS AND TRADE†

I–7.1 IN GENERAL

.1(a) Introduction†

The Department of the Treasury has promulgated five sets of Regulations that place restrictions on U.S. citizens, firms, and their foreign subsidiaries in certain transactions with a number of foreign countries. Broadly stated, the Regulations act to control or prohibit import, export, and other financial and commercial transactions with various countries and to restrict the use of the assets of certain foreign countries or their nationals that are located in the United States or under the control of U.S. nationals.

The Regulations now in effect are the Foreign Assets Control Regulations,[1] the Transaction Control Regulations,[2] the Cuban Assets Control Reglations,[3] the Foreign Funds Control Regulations,[4] and the Rhodesian Sanctions Regulations.[5] The statutory authority for the first four Regulations is Section 5(b) of the Trading With the Enemy Act of 1917, as amended.[6] The Cuban Regulations and also issued under Section 620(a) of the Foreign Assistance Act of 1961.[7]

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†The views expressed in this section are those of the author and do not necessarily reflect the views of the United States Government or any agency thereof.

[1] 31 C.F.R. pt. 500 (1975).

[2] *Id.* pt. 505 (1975).

[3] *Id.* pt. 515 (1975).

[4] *Id.* pt. 520 (1975).

[5] *Id.* pt. 530 (1975).

[6] 50 U.S.C. App. § 5 (1970). Section 5(b) provides:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses or otherwise

(A) investigate, regulate, or prohibit any transactions in foreign exchange. transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States . . .

The powers given the President under Section 5(b) were delegated to the Secretary of the Treasury by Exec. Order 8389, 3 C.F.R. 645 (Cum. Supp. 1938–1943) and Exec. Order 9193, 3 C.F.R. 1171 (Cum. Supp. 1938–1943).

Section 5(b) of the Trading with the Enemy Act was used in 1971 as authority to impose a 10 per cent *ad valorem* supplemental duty on most articles imported into the United. States. The duty was imposed to rectify a serious balance of payments problem caused in part by foreign governments manipulating foreign exchange rates in their favor. This use of Section 5(b) of the Trading with Enemy Act was sustained by United States Court of Customs and Patent Appeals, United States v. Yoshida Int'l, Inc., 526 F. 2d 560 (C.C.P.A. 1975).

[7] 22 U.S.C. § 2370(a) (1970).

The Statutory authority for the Rhodesian Sanctions Regulations is Section 5 of the United Nations Participation Act of 1945.[8] The various Regulations are administered by the Office of Foreign Assets Control,[9] Department of the Treasury.

.1(b) Objectives of the regulations

The several Regulations have certain general objectives, each designed to impose economic restrictions on specified foreign countries in accordance with U.S. policy considerations. A major goal of the Foreign Assets Control, Cuban Assets Control, and Rhodesian Sanctions Regulation is to prevent the countries specified in the Regulations from earning foreign exchange from the United States. This goal is accomplished by restricting the purchase or importation of goods originating in the designated foreign countries, by denying them access to U.S. commerical and financial facilities, and denying them use of their assets in the United States.

Another objective, common to the Foreign Assets Control, the Cuban Assets Control, and the Foreign Funds Control Regulations, is to keep the U.S.-located assets of the countries specified in these Regulations in the United States pending settlement of U.S. private claims against such countries for uncompensated expropriation of privately owned U.S. assets. This goal is realized by *blocking*[10] property subject to U.S. jurisdiction that belongs to the designated foreign countries or their nationals, thus denying them the ability to transfer their property without a Treasury license.

Finally, the Foreign Assets Control, the Cuban Assets Control, and the Transaction Control Regulations act to supplement the Commerce Department's Export Control Regulations[11] by restricting certain offshore transactions not subject to Commerce Department regulation. Generally speaking, the Department of Commerce has authority to restrict all exports from the United States and reexports from abroad of *U.S. origin goods and components parts.* In practice, Commerce Department restrictions are imposed primarily against exports and reexports to a limited number of countries. The Treasury Regulations also provide authority to limit exports to these countries. However, in some respects the authority of the Treasury Department is broader than that of the Commerce Department, since the Treasury Regulations cover *all transactions* with these countries—regardless of the origin or place of shipment of the goods involved—entered into by U.S. citizens, firms, or their foreign subsidiaries. The Treasury Department thus has sole jurisdiction over exports by such persons and firms of foreign origin goods and components from third countries to the various countries listed in the Regulations. Accordingly, U.S. subsidiaries or citizens seeking to export foreign goods or components from third countries to any of the designated countries must qualify for, or under, a Treasury Department license.[12]

.1(c) Licensing procedures

Each of the several Regulations sets out broad prohibitions against a wide range of property transfers and business and financial transactions with designated foreign countries. The Treasury Department, however, is empowered to authorize transactions that would otherwise be prohibited under the Regulations through the use of licenses. The Treasury Department issues a license—in effect granting an exception to the blanket prohibitions set out in the Regulations—

[8] *Id.* § 287c (1970). Section 287c(a) provides authority for the President to implement decisions of the Security Council of the United Nations. This authority was delegated to the Secretary of the Treasury in Exec. Order 14419, 3 C.F.R. 737 (Cum. Supp. 1966–1970). *See also* Exec. Order 11322, 3 C.F.R. 606 (Cum. Supp. 1966–1970). The Secretary delegated his authority to the Office of Foreign Assets Control, 32 Fed. Reg. 3172 (February 27, 1967).

[9] Office of Foreign Assets Control, Dep't of the Treasury, Washington, D.C. 20220.

[10] *Blocking* (commonly called *freezing*) means prohibiting any transaction with respect to any property subject to U.S. jurisdiction in which a particular foreign country or its national has any interest, unless the transaction is authorized by the Department of the Treasury. Title to blocked property remains in the designated foreign country or national, and possession is retained by the holder (most often a banking institution) of the assets at the time the blocking regulation went into effect. Blocking vests no interest in the property in the U.S. Government. *See* 31 C.F.R. §§ 500.201–.202 ; 515.201–.202 ; 520.101 (1975).

[11] *See* Part 1, § 5.

[12] Treasury Regulations provide that when export transactions are authorized or licensed by the Department of Commerce, no additional Treasury authorization is required. *See, e.g.,* 31 C.F.R. §§ 500.533, .541 (1975). In the case of exports from third countries containing both U.S. and foreign component parts or goods, however, two licenses are required : a Commerce license is required for the U.S. origin portion and a Treasury license needed for the foreign portion of the shipment.

when it determines that a certain category of transactions or a particular transaction may be allowed in accordance with the policy considerations underlying the Regulations. The variety and scope of the licenses now available under certain of the Regulations reduces the number of transactions actually prohibited under those Regulations.

Two types of licenses are employed under the Regulations:

General Licenses. General licenses are incorporated in the text of the Regulations and authorize certain categories of transactions for all persons and particular transactions qualifying under the terms of the license itself. No other approval, procedures, or applications are required to engage in transactions authorized under a general license. For example, the Foreign Assets Control Regulations, which control transactions with the People's Republic of China, North Korea, Vietnam, and Cambodia, now contain a general license authorizing most transactions with the People's Republic of China.

Specific Licenses. Specific licenses are issued on the basis of written applications in individual cases in which the particular transaction is prohibited by the Regulations and has not been authorized under a general license. Although the grant or denial of a specific license is a matter of discretion, as a practical matter certain categories of transactions are routinely approved, and others are uniformly denied. Applications for specific licenses are filed in duplicate with the Federal Reserve Bank of New York,[13] whose Foreign Assets Control Division initially screens applications. In many routine cases the Bank is authorized to approve or deny application for a specific license, under guidelines established by the Washington Office. In other cases, applications are forwarded to the Office of Foreign Assets Control, in Washington, for final disposition.

.1(d) Persons covered by the regulations

The various Regulations apply to certain transactions with designated foreign countries and their nationals that are entered into ". . . by any person . . . subject to the jurisdiction of the United States." [14] For purposes of the Foreign Assets Control and the Cuban Assets Control Regulations, the term *person subject to the jurisdiction of the United States* includes any person,[15] wherever located, who is a citizen or a resident of the United States; a person actually within the United States; a U.S. corporation; and any business, wherever located,[16] that is owned or controlled by U.S. residents or citizens, by a U.S. corporation, or by a person actually in the United States.[17] Hence, a U.S. national or corporate subsidiary operating abroad [18] falls clearly within the ambit of a *person subject to the jurisdiction of the United States* and thus is subject to the strictures of these Regulations.

.1(c) Enforcement

Individuals who participate in any transaction covered by the several Regulations must keep a full and accurate record of each such transaction.[19] Records must be kept available for inspection for at least two years after the transaction is completed. In addition to these records, the Secretary of the Treasury may require that any person engaging in such transactions provide a full report of the transaction, including the production of any documents pertaining to the transaction.[20] Currently, such reports are requested on a case-by-case basis, where required.

Although records are required to be kept for only two years, it is advantageous to keep permanent records of any transaction involving blocked accounts. The Treasury Department may decide to conduct a "census" of all assets and accounts blocked under the various Regulations. The Department may require holders of blocked accounts to explain any diminution in value or transfer of

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[13] The Federal Reserve Bank is located at 33 Liberty Street, New York, N.Y. 10015. *See* Exhibits 1 through 4 following this section for reproductions of the license application forms now required under the various Regulations.

[14] 31 C.F.R. §§ 500.201; 515.201; 530.201 (1975).

[15] *Person* is defined to include an individual, organization, or business enterprise. 31 C.F.R. §§ 500.308; 515.308; 530.301 (1975).

[16] The Rhodesian Sanctions Relations, however, apply to those U.S. subsidiaries or firms incorporated or having their principal place of business in Rhodesia, but not to U.S. subsidiaries or firms incorporated or operating in third countries. 31 C.F.R. § 530.307(a)(4) (1975). *See* Part I, § 7.6 *infra*.

[17] *Id.* §§ 500.329; 515.329 (1975).

[18] *See supra* note 16.

[19] 31 C.F.R. §§ 500.601; 505.10; 515.601; 520.601; 530.601 (1975).

[20] *Id.* §§ 500.602; 505.10; 515.602; 520.602; 530.602 (1975).

funds that is disclosed in the course of a census of blocked accounts. Since a census may be conducted considerably more than two years after any particular transaction has taken place, it is advisable to keep records of transactions involving blocked accounts considerably longer than the two-year minimum. This is particularly important in the case of transactions conducted under a general license. In such cases, the Treasury Department will have no record of the transaction,[21] and accordingly, the burden of proving that the transaction qualified under a general license is placed on the holder of the blocked account.

Any transaction entered into in violation of those Regulations promulgated under the authority of the Trading With the Enemy Act [22] is void and unenforceable in the United States.[23] But such transactions may be validated under certain circumstances, even after they are completed, if an appropriate license or authorization is issued.[24]

Section 5(b) of both the Trading With the Enemy Act, as amended, and the United Nations Participation Act provide that persons who knowingly violate the provisions of the Acts or Regulations promulgated thereunder are subject to a fine of up to $10,000. Natural persons may also be imprisoned for up to 10 years.[25]

I—7.2 FOREIGN ASSETS CONTROL REGULATIONS

The Foreign Assets Control Regulations [26] were issued on December 17, 1950, as a result of the emergency declared by the President on December 16, 1950, following the entrance of armed forces of the People's Republic of China into the Korean War.[27] They were amended in 1964 to apply to North Vietnam [28] and were further amended in 1975 to include Cambodia [29] and South Vietnam.[30]

These Regulations are directed at certain transactions involving the People's Republic of China, North Korea, Vietnam, and Cambodia, the nationals of those countries or the property belonging to such countries or their nationals. Specifically, the Regulations act to block all assets within U.S. jurisdiction in which these countries of their nationals have any interest,[31] to prohibit the purchase or importation of their goods by persons under U.S. jurisdiction,[32] to prevent the export of foreign origin goods or component parts from third countries to any of the listed countries,[33] and to prohibit the use of U.S. financial and commercial facilities in transactions with such countries or their nationals.[34]

A number of important general licenses have been issued that have limited the impact of the Foreign Assets Control Regulations. For example, most transactions with the People's Republic of China are authorized by general licenses that

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[21] This is so because persons engaging in transactions authorized under a general license need not inform the Treasury Department of any such actual transaction. *See* Part I, § 7.1(c) *supra*.

[22] 50 U.S.C. App. § 5 (1970).

[23] 31 C.F.R. §§ 500.203 (a)–(b), (c) ; 515.203 (a)–(b), (c) (1975). This provision in the Regulations enables the Treasury Department to require any participant in the illegal transfer of funds from blocked accounts, with or without knowledge of the illegality of the transfer, to reimburse the blocked account for the full amount of the transfer. *See* Orvis v. Brownell, 345 U.S. 183 (1953) ; Propper v. Clark, 337 U.S. 442 (1949) ; Schumacker v. Brownell, 210 F. 2d 14 (3d Cir. 1954). *See also* United States v. Alcatex, Inc., 328 F. Supp. 129 (S.D.N.Y. 1971).

[24] 31 C.F.R. § 500.203 (1975).

[25] 50 U.S.C. App. § 5(b) (1970) ; 22 U.S.C. § 287c(b) (1970). *See* United States v. Quong, 303 F. 2d 499 (6th Cir. 1962) ; Woo Nai Chan v. United States, 271 F. 2d 708 (9th Cir. 1960) ; United States v. China Daily News, 224 F. 2d 670 (2d Cir.), *cert. denied*, 350 U.S. 885 (1955) ; United States v. Broverman, 180 F. Supp. 631 (S.D.N.Y. 1959) ; United States v. Wagman, 168 F. Supp. 248 (S.D.N.Y. 1958) ; United States v. Weishaupt, 167 F. Supp. 211 (E.D.N.Y. 1958).

[26] 31 C.F.R. pt. 500 (1975). For recent cases rejecting Constitutional challenges to the Foreign Assets Control Regulations, *see* Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, 159 F. 2d 676 (3d Cir.). *cert. denied*, 109 U.S. 933 (1972) ; Cheng Yih-Chun v. Federal Reserve Bank, 412 F. 2d 160 (2d Cir. 1971) ; Teague v. Regional Comm'r of Customs, 404 F. 2d 441 (2d Cir. 1968). *cert. denied*, 394 U.S. 977 (1969). For a detailed discussion of the Foreign Assets Control Regulations as they relate, in particular, to the People's Republic of China, *see* Bayar, *The Blocked Chinese Assets: Present Status and Future Disposition*, 15 Va. J. Int'l. L. 959 (1975).

[27] Exec. Proclamation No. 2914, Dec. 16, 1950, 3 C.F.R. 99 (Cum. Supp. 1949–1953), 50 U.S.C. App. notes preceding § 1 (1970).

[28] 29 Fed. Reg. 6025 (May 5, 1964), *amending* 31 C.F.R. § 500.201 Schedule (1975).

[29] 40 Fed. Reg. 17262 (April 17, 1975), *amending* 31 C.F.R. § 500.201 Schedule (1975).

[30] 40 Fed. Reg. 19202 (May 2, 1975), *amending* 31 C.F.R. § 500.201 Schedule (1975).

[31] 31 C.F.R. § 500.201 (1975).

[32] *Id.* §§ 500.201, .204 (1975).

[33] *Id.* §§ 500.201, .533, .544 (1975). The Regulations thus primarily affect those export transactions outside the jurisdiction of the Dept. of Commerce. *See supra* note 12, and accompanying text.

[34] 31 C.F.R. § 500.201 (1975).

were issued in 1971.[35] However, Chinese property that was frozen as of the effective date of these general licenses continues to be frozen.[36] And strategic exports from foreign affiliates of U.S. firms to the Peoples' Republic of China remain under licensing control.[37]

As a further example of the general licenses incorporated in the Foreign Assets Control Regulations, a variety of transactions involving blocked assets and accounts are permitted under general license. A banking institution, for example, may purchase and sell securities on behalf of a designated foreign national with the funds deposited in a blocked account.[38] The securities purchased or the proceeds of sale, however, must be redeposited in the blocked account. And most payments and transfers of credit to blocked accounts are authorized provided the payment or transfer does not act to create or transfer an interest in the account to any other country or person.[39]

Lastly, most exports and reexports of U.S. origin goods on component parts are permitted under general license, when the particular transaction has been licensed or authorized by the Department of Commerce.[40] Failure in such transactions to obtain or quality under a license issued by the Commerce Department is a violation of the Trading With the Enemy Act as well as the Export Administration Act.

I—7.3 CUBAN ASSETS CONTROL REGULATIONS

The Cuban Assets Control Regulations[41] were issued on July 8, 1963, incorporating and expanding upon a series of economic sanctions imposed against Cuba, beginning in 1960.[42] These Regulations are substantially similar in scope and application to the Foreign Assets Control Regulations as now applied to North Korea, Vietnam, and Cambodia.[43]

The Cuban Assets Control Regulations are unique in at least one respect, however. Between 1963 and 1975, the Regulations contained a general license[44] authorizing U.S.-controlled firms in third countries to trade with Cuba. But U.S. citizens who were officers or directors of such firms were prohibited from any paritcipation or involvement in such transactions.[45] This prohibition, coupled with the U.S. policy of dissuading foreign affiliate trade with Cuba, had the practical effect of precluding most, if not all, trade with Cuba by U.S.-controlled firms operating in foreign countries.[46]

In October 1975, the general license authorizing foreign affiliate trade with Cuba was revoked, as was the provision prohibiting the involvement of U.S. officers and directors in such trade. In their place, a new and more liberal section was added, which provides that specific licenses are to be issued for certain categories of transaction between U.S.-owned or controlled firms in third countries and Cuba when such transactions are favored or required by local law or policy in the third country.[47] In order to obtain a specific license to export goods from

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[35] *Id.* §§ 500.546–.547 (1975).
[36] *Id.* § 500.546(b)(4) (1975).
[37] *Id.* § 500.546(b)(2) (1975).
[38] *Id.* § 500.513 (1975).
[39] *Id.* § 500.508 (1975).
[40] *Id.* §§ 500.533, .544 (1975).
[41] *Id.* pt. 515 (1975). For recent cases upholding various applications of the Cuban Assets Control Regulations, *see* Nielson v. Secretary of the Treas., 124 F. 2d 833 (D.C. Cir. 1970); Sardino v. Federal Reserve Bank, 364 F. 2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1965); American Documentary Films, Inc. v. Secretary of the Treas., 311 F. Supp. 703 (S.D.N.Y. 1972).
[42] Economic sanctions were first imposed against Cuba in 1960 when the President, acting under the authority of the Sugar Act of 1918, *as amended*, 7 U.S.C. § 1158 (a)–(b) (1970), directed a reduction in the Cuba sugar quota, 25 Fed. Reg. 6114 (July 7, 1960); 43 Dep't State Bull. 140 (1960). In October 1960, the United States denied export licenses for most industrial exports to Cuba. 43 Dep't State Bull. 715 (1960), and two months later the Cuban sugar quota was eliminated. 11 Dep't State Bull. 18 (1961). A complete embargo on imports from Cuba was imposed by the Treasury Department in February 1962. 27 Fed. Reg. 1116 (February 7, 1962).
[43] *See* Part I, § 7.2 *supra*.
[44] 31 C.F.R. § 515.544 (1975).
[45] *Id.* § 515.544(e) (1975).
[46] The Treasury Department regulation prohibiting the U.S. officers and directors of U.S. affiliates from participating in transactions with Cuba was the source of some irritation to foreign governments whose law or policy favored trade with Cuba. By observing the Treasury regulation, U.S. officers and directors ran the risk of violating such local law or policy.
[47] 40 Fed. Reg. 17108 (October 8, 1975), *revok'g* 31 C.F.R. § 515.511 and *adding* 31 C.F.R. § 515.559 (1975).

a third country to Cuba, the goods must be produced in the third country; they must be nonstrategic in nature; and no U.S. origin technical data, other than service and operation data, may be transferred. Furthermore, the export transactions may not involve any U.S. dollar accounts, or financing provided by a U.S.-owned or controlled firm, except for normal short-term financing. If the goods to be exported to Cuba contain U.S. origin parts or components, the transaction must first be licensed by the Department of Commerce.

The new section also permits U.S.-owned or controlled firms in third countries to import Cuban products. The sole requirement to qualify for a specific license in such cases is that the U.S. firm be located in the importing country.[48]

I–7.4 TRANSACTION CONTROL REGULATIONS

These Regulations[49] were issued on June 29, 1953, to supplement the export controls imposed by the Department of Commerce over direct exports from the United States to certain countries.

The Transaction Control Regulations prohibit a person within the United States[50] from participating in any transactions involving the shipment of certain strategic goods[51] located abroad to any of the following countries: Albania, Bulgaria, People's Republic of China, Cambodia, Czechoslovakia, German Democratic Republic and East Berlin, Hungary, North Korea, Outer Mongolia, Poland and Danzig, Romania, the Soviet Union, North Vietnam, and South Vietnam.[52] A general license, however, has been issued that authorizes such transactions by U.S. citizens and firms where the shipment is from, and licensed by, a COCOM country, to any of the listed countries except Cambodia, North Korea, North Vietnam, or South Vietnam.[53] Any shipment that contains component parts of U.S. origin must also be licensed by the Commerce Department.[54]

I–7.5 FOREIGN FUNDS CONTROL REGULATIONS

The Foreign Funds Control Regulations[55] have little current importance in East-West trade. They continue World War II blocking controls with respect to the assets in the United States of certain countries, or nationals of those countries, that were wholly blocked during the war.[56]

The Foreign Funds Control Regulations now apply to World War II blocked assets of Czechoslovakia, Estonia, the German Democratic Republic, Latvia, Lithuania, and their nationals.[57] The current purpose of these Regulations is to keep intact blocked assets until such time as claims settlement agreements are reached, settling private U.S. claims for uncompensated expropriations.

I–7.6 RHODESIAN SANCTIONS REGULATIONS

The Rhodesian Sanctions Regulations[58] were issued on July 29, 1968, in accordance with United National Security Council Resolution No. 232 of 1966, and No. 253 of 1968, which called upon member states to impose economic sanctions against Rhodesia.[59] The Regulations were promulgated under Section 5 of the United Nations Participation Act of 1945.[60] which provides authority for the President to implement decisions of the U.N. Security Council.

The Rhodesian Sanctions Regulations are basically similar to the Foreign Assets Control Regulations and Cuban Assets Regulations.[61] However, there are some significant differences. For example, the Rhodesian Sanctions Regulations

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[48] 31 C.F.R. § 515.559(a)(3) (1975).
[49] *Id.* pt. 505 (1975).
[50] *Id.* § 505.10 (1975).
[51] The U.S. index of strategic materials is enumerated in the Commodity Control List. 15 C.F.R. pt. 399 (1975). *See* Part I, § 5.4 for a discussion of the Commodity Control List.
[52] 34 C.F.R. § 505.10 Schedule (1975). Cambodia and South Vietnam were added to the list in 1976. 41 Fed. Reg. 16556 (1976).
[53] 31 C.F.R. § 505.34(a) (1975); COCOM is currently comprised of all the NATO countries, (except Iceland) and Japan. COCOM export controls are discussed at Part I, § 5.5.
[54] 31 C.F.R. § 505.34(a) (1975).
[55] *Id.* pt. 520 (1975).
[56] Exec. Order No. 8389, 3 C.F.R. 645 (Cum. Supp. 1938–1943); Exec. Order No. 44281, 3 C.F.R. § 546 (Cum. Supp. 1966–1970).
[57] 34 C.F.R. § 520.404 (1975).
[58] *Id.* pt. 530 (1975).
[59] U.N. doc. s/Res. 232 and Corr. 1 (1966) (s/Res. 762/Rev. 1, *as amended*); U.N. doc. s/Res. 253 (1968).
[60] 22 U.S.C. § 287c (1970).
[61] *See* Part I, §§ 7.2–.3.

do not prohibit transfers of property within Rhodesia by persons subject to the jurisdiction of the United States to any other person if the property is not related to the conduct of those business activities prohibited by the Regulations (such as most imports to and exports from Rhodesia or the shipment or carriage of merchandise to or from Rhodesia).[62]

The scope of application of the Rhodesian Sanctions Regulations is also more limited than that of the Foreign or Cuban Assets Control Regulations. The Rhodesian Sanctions Regulations do not apply to U.S. subsidiaries operating in third countries.[63] The Regulations, however, do apply to U.S. firms located in Rhodesia or in the United States. Furthermore, the Regulations prohibit the U.S. officers and directors of any foreign firm or U.S. subsidiary in a third country from permitting or authorizing trade with Rhodesia.[64]

The treatment applied to Rhodesian accounts in the United States under the Regulations differs somewhat from that applied to accounts under the various other Regulations. Since Rhodesian accounts are blocked only for purposes of preventing trade between the United States and Rhodesia, fewer restrictions are imposed on Rhodesian accounts than on accounts blocked under the other Regulations.[65]

The Rhodesian Sanction Regulations provide that specific licenses may be issued authorizing certain transactions. For example, a specific license may be granted authorizing the shipment from any foreign country to Rhodesia of medical supplies, educational supplies, news materials, and foodstuffs.[66] Also, a general license has been issued in connection with the enactment of the "Byrd Amendment," authorizing the importation into the United States of certain Rhodesian materials determined to be strategic and critical under the Strategic and Critical materials Stockpiling Act;[67] chief among them are chromium ore or concentrates.[68]

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Editors' Note: The outstanding or the especially thorough authorities are marked with an asterisk.

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[63] *Id.* § 530.307 (1975).
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[65] *Id.* §§ 530.211–.312 (1975).
[66] *Id.* § 530.506 (1975). Similarly, specific licenses may be issued authorizing remittances to persons in Rhodesia for medical, humanitarian, or educational purposes, 34 C.F.R. § 530.508 (1975).
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APPENDIX 3

JUSTICE DEPARTMENT MEMORANDUM ON SECTION 5(b) OF THE TRADING WITH THE ENEMY ACT

[From the Congressional Record, Oct. 7, 1974]

DEPARTMENT OF JUSTICE,
May 21, 1973.

MEMORANDUM FOR THE SPECIAL COMMITTEE ON THE TERMINATION OF THE NATIONAL EMERGENCY

Re: Emergency power under § 5(b) of the Trading With the Enemy Act

During the course of hearings held by the Committee frequent mention has been made of the Trading with the Enemy Act ("the Act"). Section 5(b) of the Act has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to "trading with the enemy." Its use over the years provides an interesting study in the evolution of a statute as a result of continuing interplay between the Executive and Congress. Of all the emergency statutes under study by the Committee, it has the most complex and varied history. This paper does not make any recommendations or draw any conclusions but presents a short legal chronology of § 5(b) to assist the Committee in understanding its background and present status.

I. ORIGINAL ENACTMENT—WORLD WAR I

The Act was passed in 1917 to "define, regulate, and punish trading with the enemy." 40 Stat. 415. Section 5(b) gave the President power to regulate transactions in foreign exchange, the export or hoarding of gold or silver coin or bullion or currency and transfers of credit in any form "between the United States and any foreign country, whether enemy, ally of enemy, or otherwise," 40 Stat. 415 (1917) as amended by 40 Stat. 966 (1918). Section 5(b), at that time, exempted "transactions to be executed wholly within the United States," thus appearing to limit its use as a basis for domestic controls. It did not include a provision permitting use of the Act during periods of national emergency nor was its use restricted by its terms to the duration of the First World War or any specified term after the end of the War. A law passed in 1921 terminating certain war powers specifically exempted the Act from termination because of the large amount of property held under the Act by the Alien Property Custodian at that time. See Ellingwood, *The Legality of the National Bank Moratorium*, 27 Nw. U.L. Rev. 923, 925–26(1933).

II. DEPRESSION BANKING EMERGENCY

Upon taking office in March 1933 President Roosevelt was pressed to deal promptly with a nationwide panic that threatened to drain the liquid resources of most of the banks in the country. *The Public Papers and Addresses of Franklin D. Roosevelt*, pp. 24–29 (1933) [hereinafter "Roosevelt Papers"]. He therefore invoked the "forgotten provisions" of § 5(b) on March 6, 1933 to declare a bank holiday and control the export of gold. Schlesinger, *The Coming of the New Deal* 4 (1959). The bank holiday proclamation noted that there had been "heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding" and that increasing speculation abroad in foreign exchange had resulted in severe drain on domestic gold supplies, thus creating a "national emergency." Therefore it was "in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange." In order to prevent export or hoarding of bullion or currency a bank holiday was

therefore proclaimed from March 6 through March 9, 1933. Executive Proclamation No. 2039. March 6, 1933, 48 Stat. (Part 2) 1698.

By invoking § 5(b) as authority, President Roosevelt was, of course, using that provision for a different purpose than the one for which it was enacted in 1917. However, as one writer noted, closing the banks was "one of the surest and quickest ways" to prevent transactions in foreign exchange and the exportation of gold and silver coin, bullion and currency. Section 5(b) had, as noted, given the President power to regulate such matters. Ellingwood, *The Legality of the National Bank Moratorium*, 27 Nw. U.L. Rev. 923, 925 (1933).

Congress was called into session within days of the Proclamation. Roosevelt Papers 17. As soon as Congress was convened on March 9, 1933, it approved the bank holiday by passing the so-called Emergency Banking Act or Bank Conservation Act. 48 Stat. 1. That Act provided that the actions and proclamations "heretofore or hereafter taken . . . or issued by the President of the United States . . . since March 4, 1933, pursuant to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed." (48 Stat. 1; 12 U.S.C. 95b (1970)). Congress thus "spread its protective approval over executive acts the legality of which was uncertain." Ellingwood, *op. cit. supra* at 27 Nw. U.L. Rev. 929 (1933). Congress also amended Section 5(b) to provide, among other things, that "[d]uring time of war or during any other period of national emergency declared by the President, the President may . . . regulate, under such rules and regulations as he may prescribe . . . transfers of credit between or payments by banking institutions as defined by the President. . . ." 48 Stat. 1. In the enactment clause Congress declared "that a serious emergency exists." 48 Stat. 1. The exclusion of domestic transactions, formerly found in the Act, was deleted from § 5(b) at this time.

The legislative history of the Emergency Banking Act is short; only eight hours elapsed from the time the bill was introduced until it was signed into law. There were no committee reports. Indeed, the bill was not even in print at the time it was passed. 77 Cong. Rec. 76, 80 (1933); Schlesinger, *The Coming of the New Deal* 8.

The abbreviated history shows Congress recognized that the powers conferred on the President by the Act were great. In the debate preceding the bill's passage those supporting it made such remarks as:

". . . in time of storm there can only be one pilot. In my judgment, the House of Representatives realize that the pilot in this case must be the President of the United States, and they will steer their course by him (Rep. Goldsborough, 77 Cong. Rec. 81).

"It is a dictatorship over finance in the United States. It is complete control over the banking system in the United States. (Rep. McFadden, 77 Cong. Rec. 80).

"I realize that in time of peace we have perhaps never been called upon to vest such transcendent powers in the Executive as are provided for in this bill. . . . It is an emergency which can be adequately dealt with only by the strong arm of Executive power, and therefore I expect to vote for the bill, though it contains grants of powers which I never before thought I would approve in time of peace." (Sen. Connally, 77 Cong. Rec. 65).

The courts later upheld the validity of the bank holiday under the Act as amended, *E.g., Smith* v. *Witherow*, 102 F.2d 638, 641 (3d Cir., 1939); *Hardee* v. *Washington Loan & Trust Co.*, 91 F.2d 314 (D.C. Cir. 1937). Because of the prompt action taken by Congress in ratifying the March 6 proclamation, no judicial decisions were rendered on the question of whether the President's action, if taken alone, would have been lawful.

Subsequently in 1933–34, acting under § 5(b), President Roosevelt issued a series of orders which prohibted the hoarding of gold and directed that all gold bullion certificates be deposited with the Federal Reserve Banks and which regulated transactions in foreign exchange:

(1) Executive Order 6073 of March 10, 1933, prohibited the export or removal of gold from the United States, except as authorized by the Secretary of the Treasury, and banks were prohibited from making transfers with certain described transactions. This order did not specifically refer to a national emergency.

(2) Executive Order 6102 of April 5, 1933, generally required holders of gold coin, gold bullion, and gold certificates to surrender their holdings to Federal Reserve Banks. This Order stated "By virtue of the authority vested in me by

Section 5(b) . . . as amended by Section 2 of the Act of March 9, 1933, . . . in which amendatory Act Congress declared that a serious emergency exists, I . . . do declare that said national emergency still continues to exist."

(3) Executive Order 6111 of April 20, 1933, authorized the Secretary of the Treasury to regulate transactions in foreign exchange and the export or withdrawal of currency from the United States. The emergency basis for E.O. 6111 was stated in the same language as the language of E.O. 6102, quoted immediately above.

(4) Executive Order 6260 of August 28, 1933, was issued to supplant Executive Orders 6102 and 6111. This order prohibited the holding or export of gold, except under license issued by the Secretary of the Treasury, and authorized the Secretary to regulate or prohibit transactions in foreign exchange. In E.O. 6260 the President stated "I . . . do declare that a period of national emergency exists." Executive Order 6260 was confirmed and amended by Presidents Eisenhower and Kennedy. 31 CFR Part 54. See 42 Op. A.G. No. 35, p. 9.

(5) Executive Order 6560 of January 15, 1934, authorized the Secretary of the Treasury to regulate transactions in foreign exchange, transfers of credit from American to foreign banks and export of currency or silver coin. This order is still on the books today. See 31 CFR Parts 127–128. In this Order, the President declared that "a period of national emergency continues to exist."

In January 1934 Congress ratified all acts which had been performed under the Emergency Banking Act. 48 Stat. 343 (1934) : 12 U.S.C. 213 (1970).

III. WORLD WAR II ALIEN PROPERTY FREEZE

Following the invasion of Norway and Denmark by Germany in April 1940 President Roosevelt acted to protect funds of residents of these countries in the United States from withdrawal under duress by issuing an order freezing those assets except as authorized by the Secretary of the Treasury. Executive Order No. 8389 (April 10, 1940). The order referred to authority under § 5(b) but did not specifically mention the existence of a national emergency. The President had proclaimed a national emergency only months before in September 1933; Proclamation No. 2352 noted the neutrality of the United States in the war and stated:

"Whereas measures required at this time call for the exercise of only a limited number of the powers granted in a national emergency:

"Now, therefore, I . . . do proclaim that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peacetime authorizations."

Subsequently on May 7, 1940, Congress passed a resolution "to remove any doubt" that § 5(b) authorized certain aspects of the freeze order. The Report of the Senate Banking Committee noted that when Congress passed the Emergency Banking Act, "it intended to grant to the President all of the powers conferred upon him by section 5(b) of the Act of October 6, 1917, and to authorize him to exercise all of such powers not only in time of war, but during any other period of national emergency." S. Rep. No. 1496, 76th Cong., 3d Sess. 1 (1949). By joint resolution. Congress thus approved and confirmed the order and amended § 5(b) to clarify the President's freeze power over alien property. 54 Stat. 179 (1940). See *United States* v. *Von Clemm*, 136 F. 2d 968, 970 (2d Cir. 1934), *cert denied*, 320 U.S. 769 (1943) upholding the retroactive validity of the 1940 joint resolution of Congress).

The original freeze order was an amendment to Executive Order No. 6560 of January 1934 regulating foreign exchange and the export of coin and currency and the controls were somewhat similar to those exercised during the First World War and during the banking crises of 1933. This order, covering Norway and Denmark, was followed by similar executive orders after other nations were invaded or subjected to Axis domination. Eventually Germany, Japan and Italy were themselves covered in June and July 1941. The purpose of the orders was to keep the Axis from using billions of dollars of assets in the United States. Roosevelt Papers (1940 vol.), p. 133–34. Regulations issued by the Secretary of the Treasury, pursuant to a general delegation of Presidential authority under § 5(b) made in 1942, continue to this date to serve as the basis for blocking trade and financial transactions with North Korea, Cuba and North Vietnam. See 31 C.F.R. part 500 *et. seq.;* Executive Order 9193, sec. 3, July 6, 1942, 7 Fed. Reg. 5205, and Executive Order 9989, Aug. 20, 1948, 13 Fed. Reg. 4891.

IV. CONSUMER CREDIT CONTROLS

Four months before the United States entered World War II, President Roosevelt issued Executive Order No. 8843, which directed the Federal Reserve Board to impose consumer installment credit controls as a measure to fight inflation. 6 Fed. Reg. 4035 (1941). The order was issued on August 9, 1941, under § 5(b) "in order, in the national emergency declared by me on May 27, 1941 to promote the national defense and protect the national economy. . . ." 6 Fed. Reg. 4035 (1941). On May 27, 1941, the President had issued Proclamation No. 2487 which proclaimed that "an unlimited national emergency confronts this country, which requires that its military, naval, air and civilian defense be put on the basis of readiness to repel any and all acts or threats of agression directed toward any part of the Western Hemisphere."

In Executive Order 8843 the term "banking institution" as used in § 5(b), was defined to include any person engaged in the business of making extensions of credit whether as a vendor of consumer durable goods or otherwise. The Federal Reserve Board was authorized, in order to prevent evasion of the order, to regulate any other extension of installment credit, any credit for the purpose of purchasing or carrying any consumers' durable good or any other extension of credit in the form of a loan (other than loans to businesses or agricultural enterprises). 6 Fed. Reg. 4036.

There was some suggestion at the time that the definition of banking institution to include vendors of "consumer durable goods" was beyond the power conferred by § 5(b). One writer noted that the President had "disclosed hitherto unsuspected potentialities" in § 5(b) by using this definition of banking institutions and that a clearer statutory basis would be desirable for such controls. *Note, Federal Regulations of Consumer Credit by Executive Order*, 41 Colum. L. Rev. 1287, 1289 (1941). See also *Price Control Bill, Hearings on H.R. 5479 before the House Banking and Currency Committee*, 77th Cong., 1st Sess. pp. 116–117 (1941). Nevertheless, the controls were accepted once the order was issued and never challenged in court. In December 1941 Congress passed the First War Powers Act (55 Stat. 839) which included a provision approving and ratifying actions which had been taken under § 5(b), thus apparently approving Executive Order No. 8843.

After World War II, Congress on four occasions took legislative action concerning imposition by the Federal Reserve Board of consumer credit controls pursuant to § 5(b). The four actions by Congress are as follows:

(1) The Congress passed a joint resolution in 1947 which provided that after November 1, 1947, the Federal Reserve Board was not to exercise consumer-credit controls pursuant to Executive Order No. 8843. 61 Stat. 921, 12 U.S.C. 249. The joint resolution also provided that no "such consumer credit controls" could be exercised except during wartime or any national emergency thereafter declared by the President.

The legislation took this form because President Truman had decided to place the issue of the continuation of controls "in the laps of Congress" rather than rescind the controls himself by revoking the Executive order. 93 Cong. Rec. 9737. The legislative history of the 1947 resolution shows that Congress intended that the President have the power, if needed, to make such controls effective against the day after the resolution by declaring a new national emergency. See 98 Cong. Rec. 9753, 9758–59.

(2) On August 16, 1948, Congress changed its policy and authorized the Federal Reserve Board, "notwithstanding" the 1947 joint resolution, to exercise "consumer-credit controls in accordance with and to carry out the purposes of" Executive Order No. 8843. 62 Stat. 1291.

The legislative history of the 1948 act again affirms congressional intent that the President retain his authority under Executive Order No. 8843 to exercise consumer credit controls thereafter during time of war or national emergency. It also made clear that he could have reimposed them on his own without the 1948 resolution. The House report noted:

"When the Congress terminated the controls over consumer credit pursuant to the provision of [12 U.S.C. 249], it specifically provided that such termination did not affect the authority to reimpose such controls during the time of war or any national emergency declared by the President. The President has evidently not seen fit to use this authority to reinstate the regulation of consumer credit and henceforth the committee proposes in this joint resolution for congressional enactment of such powers for a temporary period with respect to con-

sumer installment credit and at the same time reserve the authority to exercise consumer-credit controls thereafter during the time of war or declaration of any national emergency by the President. H.R. Rept. No. 2455, 80th Cong., 2d Sess. 5–6 (1948).

The 1948 authority expired June 30, 1949.

(3) In § 601 of the Defense Production Act of 1950, using language patterned closely on that of the 1948 enactment, Congress again gave the Federal Reserve Board authority to exercise consumer credit controls under Executive Order No. 8843 "notwithstanding" the 1947 joint resolution. 64 Stat. 812.

(4) In June 1952, while extending other parts of the act, including § 602, Congress repealed § 601. 66 Stat. 305. Repealing § 601 appeared to restore the provisions of the 1947 joint resolution (12 U.S.C. 249) authorizing the impositions of consumer credit controls again during a war or a period of national emergency.

V. FOREIGN DIRECT INVESTMENT PROGRAM

Section 5(b) was also used as authority for the Foreign Direct Investment Program in 1968. Under E.O. 11387 of January 1, 1968, controls were imposed by President Johnson over transfers of capital to foreign countries by substantial investors in the United States. A formal opinion was issued by Attorney General Ramsey Clark upholding the program. The opinion reviews the history of § 5(b). It also discusses the continuation of the national emergency declared by President Truman in Proclamation 2914 of December 16, 1950, which referred to the hostilities in Korea and the world menace of the forces of communist aggression. 42 Op. A.G. No. 35. The order relies on the continuation of this emergency.

In March 2, 1973, a federal district court judge ruled orally that § 5(b) did not authorize an indictment charging a violation of the foreign direct investment program. The existence of a national emergency was not raised, however. An appeal is now being prepared. *United States* v. *Ryan*, Crim. No. 2038–78 (D.D.C. 1973). E.O. 11387 continues in effect today.

VI. EXPORT CONTROLS

Most recently, § 5(b) was used for a month in 1972 when it was invoked by President Nixon as authority for the regulations of exports. E.O. 11677 of August 1, 1972. Section 5(b) was used in this situation because the existing law authorizing export controls, the Export Administration Act of 1969, 83 Stat. 841, as amended by 86 Stat. 133, had expired. When export control legislation was re-enacted, E.O. 11677 was revoked by E.O. 11683 of August 29, 1972.

The executive order imposing controls recited the continued existence of the national emergencies declared by Proclamation No. 2914 of December 16, 1950, referred to above, and by Proclamation No. 4074 of August 15, 1971, which imposed a supplemental duty on imports for balance of payments purposes.

APPENDIX 4

FEDERAL RESERVE BOARD COMMENTS ON H.R. 1560

CHAIRMAN OF THE BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, D.C., May 4, 1977.

Hon. CLEMENT J. ZABLOCKI,
Chairman, Committee on International Relations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to respond further to your letter of February 7 requesting the Board's comments on H.R. 1560, a bill to repeal section 5(b) of the Trading With the Enemy Act of 1917.

Section 5(b) appears to have considerably more applicability to the departments and agencies within the Executive branch than to the Board. We understand that repeal of this section would jeopardize certain programs, rules and regulations of the Departments of Commerce, Justice, State, and Treasury. Therefore, the Board defers to those departments and the Office of Management and Budget in assessing the general implications of H.R. 1560.

Insofar as the Board is concerned, there seems to have been only one use by a President of the emergency powers conferred by section 5(b) that directly affected our operations. That use was the promulgation of Exectuive Order 8843 in 1941, which authorized the Board to control consumer credit. The Executive Order was ratified by the Congress after World War II with the passage of a statute (12 U.S.C. 249) providing that the Board was not to exercise consumer credit controls except during wartime or national emergencies. The Congress repealed the statute in question last year (Public Law 94–412, 90 Stat. 1255).

Section 5(b) is relied upon as the primary authority of the Secretary of the Treasury to regulate the Nation's banks in the event of an attack upon the United States. This authority has been redelegated to the Board of Governors. The Board's contingency plans to carry out this responsibility were described by Governor Coldwell in testimony before the Joint Committee on Defense Production on June 28, 1976. I have enclosed a copy of his statement.

Section 5(b) also has applicability to the Federal Reserve in its role as fiscal agent for the Treasury. In this connection, it is important to the interests of the United States that the President be authorized to block transactions with foreigners under certain circumstances (such as those specified in section 5(b)). If and when such authority is exercised and the Federal Reserve Banks are asked to act as the Treasury's agents, it is important that the Banks be granted explicit immunity against suit. Section 5(b) provides such immunity in the case of actions relying upon the Trading With the Enemy Act of 1917 or any implementing Executive Order or agency directive.

I hope that these comments will be helpful to you and your Committee in the further consideration of H.R. 1560.

Sincerely yours,

ARTHUR F. BURNS.

Enclosure.

STATEMENT BY PHILIP E. COLDWELL, MEMBER, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM BEFORE THE JOINT COMMITTEE ON DEFENSE PRODUCTION, JUNE 28, 1976

Madam Chairwoman, I am happy to have this opportunity to describe to the Joint Committee the responsibilities of the Federal Reserve System in the emergency preparedness area, and our plans to carry out those responsibilities if necessary.

Federal Reserve System involvement in contingency planning for an attack on the United States began in the early 1950's. It was formalized in 1956 when the Office of Defense Mobilization issued a Defense Mobilization Order to the

Board. That order was superseded by Presidential Executive Orders, the most recent of which is E. O. 11490 dated June 11, 1976.

The Federal Preparedness Agency has designated the Federal Reserve a Category A agency, which means that we have essential functions that must be continued during an attack and in an immediate postattack period. The Executive Order requires, among other things, that such agencies maintain alternate headquarters and sites for the storage of duplicate essential records.

More specifically, the Executive Order charges the heads of the Federal bank supervisory agencies, including the Federal Reserve Board, with responsibility for developing emergency plans, programs and regulations to cope with the potential economic effects of mobilization or an attack. Functions which the Order specifies must be carried on includes (1) provision and regulation of money and credit; (2) acquisition, decentralization, and distribution of currency; (3) collection of checks; (4) fiscal agency and foreign operations; (5) provision for the continued or resumed operations of financial institutions; and (6) provision of necessary liquidity to those institutions.

These policies and plans are not directed at the areas of the country that would be devastated by an exchange of high yield nuclear weapons. Rather, they are aimed at the undamaged or lightly damaged areas where national survival might depend upon maintaining economic momentum and organized economic activity. This is a point that is often overlooked by those who, quite understandably, are preoccupied by the terrible problems that would confront us in the damaged areas.

I should point out also that these plans are based on a general war—an "all out" nuclear exchange. However, we have examined the problems that would be generated by a limited exchange such as the one being examined by this Committee. We have concluded that the same plans would apply, the difference being one of magnitude. The plans would be easier to implement, since presumably a larger number of our normal operating facilities would survive, and problems of communication and control would be less difficult.

The Board and the Reserve Banks have organized themselves to meet the responsibilities outlined briefly above by establishing alternate headquarters and duplicate record storage sites in nontarget areas. In the Board's case, we have been able to combine these functions at a facility which also operates our vital communications system on a day-to-day basis.

Lists of officials and staff who would relocate to these sites when instructed to do so have been established and are kept current. Succession lists are maintained on a current basis. Delegations of authority which would be triggered by an attack have been made to Reserve Banks that might be out of communication with the Board.

The problem of insuring a currency supply is made difficult by the facts that the only production source of Federal Reserve notes is the Bureau of Engraving and Printing, here in Washington, and that almost all of the Reserve Banks and branches are in potential target areas. We have established an inventory of the various denominations of Federal Reserve notes at our facility at Culpeper, Virginia, to provide a cushion until the Bureau could get back into production.

Since we must assume that high speed equipment at normal operating facilities would not be available, plans for maintaining the check collection and currency distribution systems involve a high degree of decentralization. Check agent and cash agent banks, each serving a small geographic area, have agreed to perform these functions in an emergency for the Federal Reserve. Each agent bank has been furnished instructions and the necessary forms.

Most importantly, we have informed the banks and other financial institutions about these plans in detail by distributing to each copies of emergency regulations, operating circulars, and operating letters.

These plans and policies have been tested, to the extent that they can be, during national tests and exercises he'd over the past 20 years. In 1974, an interagency committee of the Federal financial agencies re-evaluated the postattack financial policies and recommended no changes.

However, the basic assumptions underlying these plans, particularly those relating to national survival and continuity of government, have not been revised since 1966. In that period the political and military situations have changed materially. For that reason, as we informed the Joint Committee in our last Annual Report, Chairman Burns has asked that these assumptions be reexamined.

We understand that General Bray is chairing an interagency steering group which is engaged in such a study. In the meantime, we plan to maintain emergency preparedness programs at the Board and at the Reserve Banks at their present levels until we are advised differently by the Administration or by the Congress.

In conclusion Madam Chairwoman, you have asked about the need for such emergency preparedness plans. In my opinion the national emergency plans on the civil side of Government are a necessary complement to the defense efforts on the military side. As long as there are such emergency plans, and in this disturbed and unsettled world they seem to be a requirement, the plans and programs I have outlined for the Federal Reserve are a fundamental feature underlying all other plans since the others assume a functioning monetary system.

APPENDIX 5

MEMORANDUM FROM THE AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, REGARDING REPEAL OF SECTION 5(b) OF THE TRADING WITH THE ENEMY ACT OF 1917, 12 U.S.C. 95a, 50 U.S.C. APP. 5b, DATED JANUARY 24, 1977

This memorandum is submitted in response to your request concerning the above subject. Specifically, you have asked the following questions concerning the possible repeal of Section 5(b) of the Act:

1. What authorities are currently or potentially exercised under 5(b), and thus possibly affected by a repeal?

2. Do other statutory bases exist for the exercise of any of those authorities which could be used by the Executive branch if 5(b) were repealed?

3. Is 5(b) in any respect necessary for the effectiveness of the rest of the Act as a wartime trade control measure; that is, if 5(b) were repealed, could the remainder of the Act stand on its own?

4. How have the courts interpreted 5(b)?

We will respond to each of these questions in turn.

Authorities Currently or Potentially Exercised Under Section 5(b)

Section 5(b) of the Act currently provides the legal basis for the following regulatory authorities:

A. Office of Alien Property, Department of Justice - 8 C.F.R. 501, 103-10. The regulations contained in these provisions govern the operations of the Office of Alien Property in the Department of Justice. There are rules relating to general procedure (Part 501); claims procedure (Part 502); availability of records (Part 503); vesting orders (Part 504); specific prohibitions against certain types of transactions (Part 505); patent, trademark, and copyright transactions (Part 507); and reports of royalties due and payable under vested patent, copyright, or trademark interests (Part 510).

B. Monetary Offices, Department of the Treasury, 31 C.F.R. 120-128. These regulations contain President Roosevelt's bank holiday Proclamation No. 2039 of March 6, 1933, as well as associated Proclamations and Executive Orders (Part 120), emergency bank regulations (Part 121), and bank licensing authority (Part 122). Also included are Roosevelt's Executive Order No. 6560 of January 15, 1934 (Part 127) and implementing regulations (Part 128) concerning the regulation of transactions in foreign exchange, transfers of credit, and the export of coin and currency.

C. Office of Foreign Asset Control, Department of the Treasury, 31 C.F.R. 500-520. These provisions contain regulations controlling foreign asset transactions with China, North Korea, Cambodia, and Vietnam (Part 500); transactions involving the shipment of certain merchandise from any foreign country to designated foreign countries (Part 505); transactions involving Cuban assets (Part 515); and foreign funds (Part 520).

D. Office of Foreign Direct Investments, Department of Commerce, 15 C.F.R. 1020-1050. The regulations contained herein implement E.O. 11387, issued January 1, 1968, which, in order to strengthen the balance of payments position of the United States, prohibits certain capital transfers abroad. The Office of Foreign Direct Investments, Department of Commerce is responsible for monitoring compliance with the Foreign Direct Investments Program as embodied in E.O. 11387. Accordingly, the regulations establish procedures for investigations (Part 1020), settlements (Part 1025), administrative proceedings (Part 1030), appeals (Part 1035), compliance (Part 1040), and miscellaneous rules (Part 1050).

E. United States Customs Service, Department of the Treasury, 19 C.F.R. 161. The regulations indicate that in addition to its enforcement responsibilities under the customs laws of the United States, the Customs Service conducts enforcement for other agencies, including the exportation of articles subject to the requirements of laws administered by the Department of Commerce [Part 161.2(a)(5)]

F. Domestic and International Business Administration, Department of Commerce, 15 C.F.R. 368-398. Section 5(b) of the Trading with the Enemy Act is cited as authority in E.O. 11940, issued September 30, 1976, which provides for the continuation of the Export Administration Regulations, notwithstanding the expiration of the Export Administration Act of 1969, as amended (50 U.S.C. App. 2401-2413).

The virtual impossibility of determining what authority might potentially be exercisable by the President pursuant to Section 5(b) of the Act leads us to avoid speculation on this question. Such a determination can only be made with any degree of assurance in the

context of a specific claim of authority advanced by the President. As will be noted infra, with respect to judicial interpretations of Section 5(b), the courts have sustained broad-gauged regulations based upon the authority of this provision.

One aid in determining the type of authority which might be based upon Section 5(b), however, is to note the various subject areas which have been regulated under the statute over the years. In this regard, reference may be made to the listing of Presidential Proclamations and Executive Orders which have been issued pursuant to Section 5(b) and which are contained in the Subcommittee's Committee Print entitled Trading With the Enemy--Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency, 94th Cong., 2d Sess. VIII-X (Nov. 1976). The subject matter diversity reflected in this listing is summarized by Chairman Bingham's statement that "[Section 5(b)] has been construed over the years as providing statutory authority for 'emergency' actions as diverse as the 'bank holiday' of 1933, an alien property freeze and consumer credit controls imposed during World War II, foreign direct investment controls imposed in 1968, and routine export controls in 1972, 1974, and 1976. It provides a major statutory basis for the trade embargoes currently in effect against North Korea, Vietnam, Cambodia, and Cuba," Committee Print, at III.

Alternative Statutory Basis for the Exercise of Section 5(b) Authority

Apart from Section 5(b) of the Act, other statutes which might arguably be involved in support of similar authority include the following:

A. United Nations Participation Act of 1945, as amended, 22 U.S.C. 287c - provides that "[n]otwithstanding the provisions of any other law, whenever the United States is called upon by the [United Nations] Security Council to apply measures which said Council has decided, pursuant to article 41 of said [United Nations] Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communications between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States."

B. Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2370(a)(1) - provides that "[n]o assistance shall be furnished under this chapter to the present government of Cuba; nor shall any such assistance be furnished to any country which furnishes assistance to the present government of Cuba unless the President determines that such assistance is in the national interest of the United States. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba."

This provision is cited as additional authority for the Cuban Assets Control Regulations in 31 C.F.R. 515, noted supra.

C. International Claims Settlement Act of 1949, as amended, 22 U.S.C. 1631 et seq. - provides for the vesting and liquidation of Bulgarian, Hungarian, and Rumanian property. This provision is cited as additional authority for the procedures applicable to the Office of Alien Property, Department of Justice, 8 C.F.R. 501, 503-505, cited supra.

D. Trade Expansion Act of 1962, as amended, 19 U.S.C. 1801, et seq. - provides that if the Secretary of Treasury, subsequent to an appropriate investigation, finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security, he shall advise the President, who is authorized to "take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security...:" 19 U.S.C. 1862(b).

Compare Section 5(b)(1)(B) of the Trading With the Enemy Act which provides, in relevant part, that "[d]uring the time of war or during any other period of national emergency declared by the President, the President may...under such rules and regulations as he may prescribe...investigate, regulate...any...importation...of...any property in which any foreign country or a national thereof has an interest by any person...subject to the jurisdiction of the United States."

E. Mutual Defense Assistance Control Act of 1951, as amended, 22 U.S.C. 1611, et seq (Battle Act) - provides that it is the "policy of the United States to apply an embargo on the shipment of arms, ammunition,

and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items of primary strategic significance used in the production of arms, ammunition, and implements of war to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination, in order to (1) increase the national strength of the United States and of the cooperating nations; (2) impede the ability of nations threatening the security of the United States to conduct military operations; and (3) to assist the people of the nations under the domination of foreign aggressors to establish their freedom, 22 U.S.C. 1611. Subsequent sections of the Act provides for the administration of this policy by an Administrator and the President.

Compare that portion of Section 5(b)(1)(B) of the Trading With the Enemy Act which provides that "[d]uring the time of war or during any other period of national emergency declared by the President, the President may...under such rules and regulations as he may prescribe... prohibit any...exportation of...any property in which any foreign country ...has any interest by any person...subject to the jurisdiction of the United States."

F. International Security Assistance and Arms Export Control Act of 1976, Pub. L. 94-329, 90 Stat. 729--provides that "[i]n furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such

articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purpose of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List;" Sec. 212, amending Chap. 3 of the Foreign Military Sales Act.

Compare with that part of Section 5(b)(1)(B) of the Trading With The Enemy Act which provides that "[d]uring the time of war or during any other period of national emergency declared by the President, the President may...under such rules and regulations as he may prescribe... regulate...any...importation or exportation of...any property in which any foreign country or a national thereof has any interest by any person... subject to the jurisdiction of the United States."

G. 12 U.S.C. 248(n)--provides that "[w]henever in the judgment of the Secretary of the Treasury such action is necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, may require any or all individuals, partnerships, associations, and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations, and corporations. Upon receipt of such gold coin, gold bullion or gold certificates, the Secretary of the Treasury shall pay therefore an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States."

Compare with that portion of Section 5(b)(1)(A) of the Trading With the Enemy Act which provides that "[d]uring the time of war or

during any other period of national emergency declared by the President, the President may, through any agency that he may designate...and under such rules and regulations as he may prescribe...regulate, or prohibit ...the importing, exporting, boarding, melting, or earmarking of gold... coin or bullion, currency and securities...by any person...subject to the jurisdiction of the United States."

Most of the previous statutes do not, of course, confer a specific "vesting" authority as does Section 5(b) of the Trading With the Enemy Act. These statutes have been listed as possible alternative sources of Section 5(b) authority, however, in light of the possibility that the broad discretionary authority therein granted to the Executive branch might be interpreted to include a vesting or similar power.

Effectiveness of Trading With the Enemy Act as A Wartime Trade Control Measure in the Absence of Section 5(b)

The repeal of Section 5(b) would not seem to impair the technical applicability of the remaining provisions of the Trading With the Enemy Act. It may be noted that the basic prohibition against trading with the enemy (Section 3) would remain intact, as well as the penalty provision for a violation of this requirement (Section 16). Moreover, the President's licensing authority under Sections 4 and 5(a) seems independent of Section 5(b). Additional provisions relating, for example, to submission of lists of enemy officers, directors or shareholders of U.S. corporations (Section 7), disposition of contracts with the enemy (Section 8), claims to property held by the Alien Property Custodian by any person not an enemy (Section 9), permitted acts in the patent, trademark, and copyright area (Section 10), and prohibited imports (Section 11), do not seem to be dependent upon Section 5(b). Nor do the provisions concerning the

administration of money and property held under the Act (Sections 23-30, 32-37, 39-44) appear to be exclusively dependent upon Section 5(b).

Although a repeal of Section 5(b) would not seem to prevent the continued operation of other provisions in the Act, the question of the general effectiveness of the Act in the absence of this section is difficult to answer with assurance. The following factors arguably suggest that Section 5(b) is of substantial importance to the effectiveness of the Act as a wartime trade control measure:

A. With the exception of tax regulations issued under Section 36, all other regulations issued under the Act have been promulgated under Section 5.

B. Section 5(b) seems to be the basic "vesting" provision of the Act.

C. Section 5(b) appears to be the most important provision of the Act for the regulation of foreign commercial transactions.

D. We have been informally advised by the Office of Alien Property, Department of Justice, that virtually all of the money and property held by that Office is held under Section 5(b).

Summary of Selected Cases Involving Section 5(b) of the Act of October 6, 1917, as amended, 12 U.S.C.A. 95a, 50 U.S.C.A. App. 5(b), the Trading With The Enemy Act (TWEA).

Section 5(b) of the TWEA empowers the President, during time of war or "any" period of national emergency declared by him, through "any" agency he designates, "or otherwise" and under "any" rules he prescribes, by means of "instructions," "licenses," "or otherwise" to (1) "regulate" or "prohibit" "any" foreign exchange "transactions," credit "transfers" or "payments," "between," "by," "through," or "to" "any" banking institution, and "importing," "exporting", "hoarding," "melting," or "earmarking" gold or silver coin or bullion, currency or securities, and (2) "regulate," "prevent," or "prohibit" the importation or exportation of, or transaction involving "any" property in which "any" foreign country or a national thereof has "any" interest, and provides that the President may in the manner provided take "other and further measures," not inconsistent with the statute for the "enforcement" of the Act. The TWEA authorizes the President to define "any or all" of the terms employed by Congress in section 5(b). Any person who willfully violates the TWEA may, "upon conviction" be fined up to $10,000, or imprisoned for ten years, or both.

Section 5(b) reads in toto as follows:

> (b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under

such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and

> no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.
>
> (3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

United States v. Quong, 303 F.2d 499 (6th Cir. 1962). Defendants were convicted of conspiracy as well as the substantive offense of violating the TWEA and implementing Foreign Assets Control Regulations by dealing in Chinese-type drugs. The Regulations prohibited any dealings by persons subject to the jurisdiction of the United States, in any manner, direct or indirect, with Communist China. The purpose of the Regulations was to deprieve the Chinese Communist of all economic advantages accruing from trade with the United States and the availability of the United States dollars. On appeal, the court affirmed/conviction on some of the charges and reversed some others for failure of proof.

Among other things, the defendant-appellants contended that the indictment did not state and the government did not prove that a foreign national or government had any interest in the proscribed

merchandise as required by section 5(b)(1)(B) of the TWEA. The appeals court stated that there was actual evidence of interest by foreign nationals and held that the term "any interest" had to be defined in the "broadest sense" so as to include "any interest whatsoever, direct or indirect." Since the goods in question came through Canada, the court found that "many Canadians, including warehouse people and carrier employees, had an interest in the forbidden goods."

Heaton v. United States, 353 F.2d 288 (9th Cir. 1965). Defendant was convicted of knowingly importing art objects from China without a license contrary to regulations issued by the Secretary of the Treasury under the authority of the TWEA. On appeal, defendant argued that the regulations did not apply to the transaction since the unlicensed goods left China prior to the effective date of the regulations. Thus, to apply them to him was to give them retroactive effect and to render them unconstitutional. The appeals court affirmed the conviction and held that the regulations did not exceed the authority conferred by the TWEA. The regulations applied in this case since they were in effect at the time of actual importation. The gist of the offense was unlicensed importation.

The purpose of the statute and implementing regulations was to deny Communist China an outlet for its goods in the United States market. This purpose would be frustrated, the court said, whenever goods produced in Communist China reach the United States market, whether directly

or through other markets, and without regard to who may hold title to the goods, or how much time may have elapsed, between exportation and ultimate importation.

The requisite interest of a foreign national or government existed since Communist China "has an interest," within the meaning of section 5(b) in any goods produced in its territory and which enter channels of foreign trade after effective date of the regulations.

United States v. Broverman, 180 F. Supp. 631 (S.D.N.Y. 1959). Defendants were indicted for violating the TWEA and implementing regulations for willfully importing hog bristles from mainland China. Defendants moved to dismiss the indictment on two grounds: first, it was contended that while the goods in question came from mainland China, the charge failed to allege that an enemy was involved; second, the indictment did not allege in the language of the TWEA that China or a national thereof had "any interest" in the bristles. The court rejected both contentions and dismissed defendants' motion.

The court held that violation of section 5(b) did not require importation of goods which had an "enemy taint" since in the 1941 amendment to the Act, Congress extended the President's power to all foreign interests, friendly and enemy. The court held that the charge did not have to allege "any interest" in the forbidden goods by a foreign national or government. Although the regulations did not recite the statutory language, their meaning only applied to transactions in such

property -- they prohibited transactions only with respect to "merchandise outside the United States." Moreover, China's interests were clearly involved, since it has "an interest in the ultimate exportation to this country, whether effected directly or indirectly, of any of its products which would help to sustain its internal economy and provide it with foreign exchange. This interest is not limited to a pecuniary benefit involved in a particular transaction. It is far more comprehensive and transcends particular shipments. It is a continuing interest. This interest extends to all Chinese products which have a market in the United States. Chinese 'merchandise outside the United States' does not yield to China needed foreign currency. China has an interest in moving such merchandise into the United States in order to obtain the currency. Thus, a transaction involving goods of Chinese origin 'outside the United States' is one involving 'property in which [a] foreign country or a national thereof has [an] interest,' as specified in section 5(b) of the Act. Thus, it is clear that [the] regulation[s] which prohibits unlicensed transactions 'in merchandise outside the United States,' the country of origin of which is China comes within the ambit of the Act is valid." Accordingly, it was not required that the indictment specify in precise statutory language that China or a Chinese national has an interest in the hog bristles.

Veterans & Reserv. For Peace In Vietnam v. Regional Com'r, 459 F.2d 676 (3rd Cir. 1972), cert. denied 409 U.S. 933. In this case the court of

appeals held that the TWEA and Foreign Assets Control Regulations prohibiting unauthorized dealings in merchandise originating in certain countries were facially constitutional and were constitutional as applied to plaintiffs who sought to receive a shipment of Red Chinese literature from North Vietnam without obtaining a license.

The court rejected plaintiff-appellants' contention that section 5(b) of the TWEA unconstitutionally delegated legislative powers without appropriate standards, saying: ". . . the statute contains two express limitations: (1) it becomes operative only during 'the time of war' or any other national emergency declared by the President,' and (2) it applies only to 'property in which any country or national thereof has or has had any interest.'"

Insofar as First Amendment was concerned, the court held that the Act and regulations as implemented here had at most incidental impact on and was not directly concerned with regulating speech or expression. The government had a compelling interest in regulating the flow of money to certain countries. Moreover, the court held the licensing scheme was neither arbitrary nor unreasonable and plaintiff-appellants were not inconvenienced in having to secure a license in order to obtain the desired literature.

Nielsen v. Secretary of Treasury, 424 F.2d. 833 (D.C. Cir. 1970). Plaintiff-appellants, Cuban refugees who owned a large bloc of the outstanding shares in a Cuban corporation, challenged the validity of

the Secretary's Cuban Assets Control regulations which prohibited them from obtaining their proportionate interest in the domestic assets of the corporation. The lower court dismissed their complaint and the court of appeals affirmed, holding that the Secretary had authority to block domestic assets of a foreign corporation under regulations prohibiting all dealings by a person subject to the jurisdiction of the United States and any property in which a designated foreign country or national thereof has any interest. The court also held that the regulations were authorized under the TWEA by virtue of the 1950 declaration of national emergency.

At the outset, the court stated that the Constitution did not inhibit a statute authorizing the implementation, during time of national emergency, of a program that freezes the status within the United States of assets of a national of a foreign country designated by the President. Conceding that the statute gave the President broad discretion, the court declared that the nondelegation doctrine "has minimal force in the area of foreign relations." The 1950 declaration of national emergency and its relevance to present circumstances were deemed to be matters not appropriate for judicial review.

Acknowledging that even a blocking of assets involved a deprivation of property, the court said that the government may validly take more drastic measures in time of emergency, especially if limited in time, than it could justify as permanent legislation.

The court concluded that a freeze on domestic assets of a foreign corporation was not unreasonable nor did it violate due process or equal protection by according dissimilar treatment to claimants of different nationalities — "at least where Congress had not spelled out a permanent vesting program."

Cheng Yih-Chun v. Federal Reserve Bank of New York, 442 F.2d 460 (2d Cir. 1971). This case involved an action to secure assets or, alternatively, to obtain a license in order to secure assets subject to the Foreign Assets Control Regulations issued pursuant to section 5(b) of the TWEA. Among other things, the regulations prohibited -- except as licensed by the Secretary -- any transaction involving "property in which any designated foreign country, or any national thereof, has at any time or since the effective date of this section has any interest of any nature whatsoever, direct or indirect." China was a designated country. The assets in question consisted of a sum of money deposited in a New York bank by decedent, a resident of China. Plaintiff-appellant, one of decedent's heirs, was permitted to take his share since he resided in Hong Kong and was therefore an "unblocked national." The remaining heirs, residents of China, gave him their share in exchange for the surrender of his interest in property left by decedent in China. When plaintiff-appellant was refused the remaining assets of the estate, he obtained a New York Surrogate's order vesting him with the estate. Notwithstanding the order, Treasury refused him a license,

an action sustained by the courts which held that the federal authorities were not bound by a state court adjudication of property rights when they are not party to the proceeding.

The court rejected appellant's contention that as applied to him the regulations were arbitrary since it was totally unrelated to their and the TWEA's purpose of denying hard currencies to blocked countries and their nationals. That, however, was not their only purpose; they were also to preserve the assets of such countries and their nationals for possible vesting and use in the future settlement of American claims against those governments and their citizens. Accordingly, the regulations were entirely reasonable.

Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966), cert. denied 385 U.S. 898. In this case, the court sustained regulations issued by the Secretary of the Treasury pursuant to section 5(b) of the TWEA freezing bank deposits in the United States of Cuban nationals. The 1950 declaration of national emergency relied on in issuing the Cuban Assets Control Regulations, was deemed valid. In all events, the Courts will not review the President's determination, "a determination so peculiarly within the province of the Chief executive."

Although the national emergency provision of section 5(b) was borne of economic emergency of the thirties, the court held that it was not limited to such emergencies.

The TWEA's broad delegation of powers to the President was justified in view of his foreign relations responsibilities and the designation of the Secretary of the Treasury to issue the regulations was held to be permissible.

The Due Process Clause was not violated by the Secretary's regulations notwithstanding that they may effectively deprive someone of the benefits of property for an indefinite duration which may outrun his life. The regulations have a dual purpose: keeping the weapon of hard currencies out of unfriendly hands and safeguarding a financial resource to compensate American citizens who have been improperly denied rights by the Cuban government. The state has an unquestioned right to protect the nationals and property while in a foreign country and this includes initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail.

United States v. Alcatex, Inc., 328 F. Supp. 129 (S.D.M.Y. 1971). In this case, the court upheld the government's right to forfeit goods imported in violation of the TWEA and implementing regulations notwithstanding that defendant importers had been convicted for importing merchandise in violation of the Act. The Double Jeopardy Clause which prohibits punishing the same offense twice was not violated since the forfeiture suit was civil and remedial rather than criminal in nature.

Welch v. Kennedy, 319 F. Supp. 945 (D.C.D.C. 1970). Plaintiff's request for a license to send contributions for use in providing medical supplies for the relief of noncombatants in North and South Vietnam was denied under authority of section 5(b) of the TWEA. He brought an action challenging the constitutionality of the TWEA or, in the alternative, asking that the TWEA be declared inapplicable to him. On cross motions for judgment, the court entered judgment for the government.

Among other things, plaintiff argued that the TWEA was never intended to regulate humanitarian medical relief to foreign nations, and attempts to so extend it collided with First Amendment religious safeguards. In support of the former, it was contended that the words "property" and "interest" had exclusive reference to commercial transactions. This narrowed interpretation, in the court's view, was inconsistent with the broad purpose of the Act, "which was to give the President full power to conduct economic warfare against belligerent nations in time of war or national emergency." Further, the history of administration under the Act reflected a flexible use of the delegated power to meet the exigencies of varying circumstances. Accordingly, the government's regulation by the use of licensee of donations was neither arbitrary nor irrational.

Any interference with the plaintiff's religious beliefs were incidental to the legitimate purposes of the Act and regulations.

With respect to the assertion that the national emergency proclaimed by President Truman in 1950 was no longer effective as a basis for invoking section 5(b) of the TWEA, the court said:

> The emergency declaration has been reaffirmed by three Presidents, most recently in 1968; and the argument that it is "stale" has been rejected twice by the Court of Appeals for the Second Circuit. . . . If such emergency as currently exists does not warrant exercise of the powers granted by Congress in the Trading With the Enemy Act, it is for Congress to speak.

Peal v. Simon, 510 F.2d 557 (5th Cir. 1975). In this case, the court of appeals reversed the district court and held that resident Cuban nationals were entitled to a license to withdraw assets blocked by Treasury Department regulations pursuant to section 5(b) of the TWEA since there was no interest on the part of the Cuban government or a Cuban national which justified application of that Act. The attempt by the Government, within the scope of the TWEA, to regulate assets in the absence of any foreign interest therein was characterized as arbitrary and without basis in either the language or the purpose of the TWEA.

Preliminarily, the court held that the Cuban Assets Control Regulations were authorized by the TWEA and that the nation was in a state of national emergency "and has been continually since President Truman declared a national emergency in 1950 due to events in Korea."

Teague v. Regional Commissioners of Customs, Region II, 404 F.2d 441 (2 Cir. 1968), cert. denied 394 U.S. 977 (1969). This case challenging the TWEA and the Foreign Assets Controlled Regulations was brought by

plaintiffs, addressees of a package of publications from North Vietnam and mainland China, who asserted various constitutional grounds. These were uniformly rejected by the court.

The court initially observed that section 5(b) of the TWEA authorizes the promulgation, during the time of war or other national emergency, of regulations controlling the flow of American currency to foreign nations. Although the declaration of national emergency was tied to "recent events in Korea and elsewhere", its continued relevance could be justified by the general reference therein to "the increasing menace of the forces of communist agression."

In turning aside the contention that the application of the regulations to printed materials abridged their First Amendment rights, the court stated that any such impact was incidental to the proper purpose of restricting the dollar flow to hostile nations. There was no permanent denial of any asserted rights since the materials were available by following proper procedures, including paying sums into the blocked accounts. Moreover, the same materials were available from other domestic sources.

For similar reasons, the regulations in question did not deprieve plaintiffs of property without due process of law. Also, since the information required under the regulations to obtain a license, the procedure did not violate the plaintiff's right against self-incrimination.

United States v. Yoshida Intern. Inc., 526 F.2d 560 (CCPA 1975). In this case, the United States Court of Customs and Patent Appeals (CCPA) held that notwithstanding the absence of implied constitutional authority and express authority in the Tariff Act, 19 U.S.C.A. 1303 et seq., or Trade Expansion Act, 19 U.S.C.A. 1801 et seq., section 5(b) empowered the President to impose and import duty surcharge of 10% on all dutiable items.

At the outset of its analysis of section 5(b) the CCPA in Yoshida declared that its "duty" was to effectuate the intent of Congress. Confining itself to the "literal meaning of the words employed," it concluded that "the express delegation in §5(b) ... is broad indeed."

> It provides that the President may, during "any" period of national emergency declared by him, through "any" agency he designates, or "otherwise,"[1] and under "any" rules he prescribes, by means of instructions, licenses, "or otherwise," "regulate," "prevent" or "prohibit" the importation of "any" property in which "any" foreign country or a national thereof has "any" interest, and that the President may, in the manner provided, take "other and further measures," not inconsistent with the statutes, for the "enforcement" of the Act.
>
> The Act authorizes the President to define "any or all" of the terms employed by Congress in §5(b). 50 U.S.C. App. 5(b)(3). 526 F.2d at 573.

The literal wording compelled the CCPA to the conclusion that it was "incontestable" that section 5(b) "does in fact delegate to the President ... the power to regulate importation. The plain and unambiguous wording of the statute permits no other interpretation" Ibid. Indeed, both logic and reason supported this conclusion since --

> ... the primary implication of an emergency power is that it should be effective to deal with a national emergency successfully. The delegation could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by Congress. Ibid.

In a footnote to its discussion of the power delegated by section 5(b), the court rejected the contention that it was limited to importation of property having an "enemy taint." Id., at n. 17.

The Customs Court's (CC) narrow reading of the law, based on the war-related history of the TWEA and the common law rule against trading with an enemy, was rejected by the CCPA. Conceding the need to determine the scope and extent of the delegated regulatory power, the CCPA refused to withhold from the President emergency authority to regulate imports by employing tariffs simply because Congress had expressly legislated on the subject. eg. Tariff Act and TEA. Also, the "numerous actions not amenable to 'licensing'" which the President was authorized to take, negated the view that licensing was the sole regulatory device open to him. Id., at 574.

Nor, in the CCPA's view, was there any merit in the contention that section 5(b) empowered the President to permit trade, not to prohibit it. That argument failed on two counts. "The statute itself authorizes the President, during emergencies, to 'regulate ... prevent or prohibit importation.' Secondly, the argument unrealistically bypasses more recent history of the TWEA. The 1933 amendment delegating

power to the President for use in response to economic emergencies (indeed, to 'any' national emergency declared by the President, Pike v. United States, 340 F.2d 487, 489 (9th Cir. 1965)), clearly expanded the purview of the TWEA from that which encompassed only trading with an enemy in time of war to that which also encompassed dealing with 'any' national emergency, including those involving no enemy and no war-related trading." Id., at 575.

The CC also erred in interpreting too narrowly the words "or otherwise." Thus,

> If the phrase "by means of instructions, licenses, or otherwise" defines "the nature and mode of the regulatory authority intended to be delegated to the President," it does so very broadly indeed. The phrase appears to be expansive, not restrictive. The words "or otherwise," if they mean anything, must mean that Congress authorized the use of means which, though not identified were different from, and additional to, "instructions" and "licenses." Congress by its use of "or otherwise," signalled its intent not to bind the President into "instructions" or "licenses," or into any other prespecified means which might preclude his dealing with a national emergency and defeat the purpose of the legislation. Id., at 576.

Accordingly, the CCPA concluded "that Congress in enacting §5(b) of the TWEA, authorized the President, during an emergency, to exercise the delegated substantive power, i.e., to 'regulate importation,' by imposing an import duty surcharge or by other means appropriately and reasonably related, ... to the particular nature of the emergency declared." Ibid.

The CCPA held that the CC had erred in assuming that the use of section 5(b) to impose a 10% surcharge implied an unlimited breadth

of presidential power which "would not only render our trade agreements program nugatory, [but] it would subvert the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs. "The correct standard by which to judge the challenged exercise, the CCPA said, was to examine it on its particular merits, not how it might be abused in some future circumstance.

> ... presidential actions must be judged in the light of what the President actually did, not in the light of what he could have done. To this we would add, "and not in light of what he might do." Each presidential proclamation or action, under §5(b) must be evaluated on its own facts and circumstances. Id., at 577.

After reviewing the President's proclamation (4074) imposing the 10% surcharge, the CCPA found it to be limited both in terms of objects and time."Far from attempting, therefore, to tear down or supplant the entire tariff scheme of Congress, the President imposed a limited surcharge, as "a temporary measure." ... calculated to help meet a particular national emergency, which is quite different from 'imposing whatever rates he deems desirable.'" Id., at 578.

Reliance by the CC on Youngtown Sheet & Tube Co. v. Sawyer (the Steel Seizure Case), supra, was "misplaced" since the surcharge did not run counter to any explicit legislation. "We know of no act, other than the TWEA, 'providing procedures' for dealing with a national emergency involving a balance of payments problem such as that which existed in 1971." Ibid. Existing statutes regulating imports; viz., the tariff Act of 1930 and its amendments, and the Trade Agreements

Act of 1934, and its amendments, and the Trade Expansion Act of 1962, and its amendments, applied to normal conditions on a continuing basis.

> ... The existence of limited authority under certain trade acts does not preclude the execution of other, broader authority under a national emergency powers act. Though 5(b) of the TWEA does overlap the traditional framework of trade legislation, it is not controlling that some of the same considerations are involved. That is to be expected. All deal with foreign commerce Congress has said what may be done with respect to foreseeable events in the Tariff Act, the TEA, and in the Trade Act of 1974 (all of which are in force) and has said what may be done with respect to unforeseeable events in the TWEA. In the latter, Congress necessarily intended a grant of power adequate to deal with national emergencies. It was error below to apply the same approach to determination of intent when Congress is legislating for normal conditions (where the grant is properly narrow) and when Congress is legislating for national emergency conditions (where the grant must be of greater breadth). We find it unreasonable to support that Congress passed the TWEA delegating broad powers to the President for periodic use during national emergencies, while intending that the President, when faced with such an emergency, must follow limiting procedures prescribed in other acts designed for continuing use during normal times." Id., at 578.

The CCPA indicated that the inherent standard by which to judge the exercise of emergency powers is the extent to which action taken is reasonably related to the power delegated and the emergency giving rise to the action. "The nature of the power determines <u>what</u> may be done and the nature of the emergency restricts the <u>how</u> of its doing. Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national

emergency, they will not hesitate to review the actions taken in response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for the courts to review his acts arising from that judgment." Id., at 578-579. After a review of the nature of the economic crisis confronting this nation because of its balance of payments problems, the CCPA concluded "that the President's action imposing the surcharge bore an eminently reasonable relationship to the emergency confronted." Id., at 580.

With respect to the constitutionality of the TWEA in light of the foregoing broad reading given to it, the CCPA declared that the surcharge "could not violate any individual's constitutional rights in foreign trade. No one has a vested right to trade with foreign nations. ... And no one has a legal right to the maintenance of an existing rate or duty." Nor [is there any] denial or infringement, even indirectly of any rights arising from any of the Amendments to the Constitution ..." Ibid.

Also, there was no violation of the concept of separation of powers or its corollary, the delegation doctrine. (i.e. the legislative power of Congress cannot be delegated except under the limitation of a prescribed standard. United States v. Chicago M. St. PER. R.Co., 282 U.S. 311, 324 (1931)). A delegation is proper, the CCPA said, if it laid down an" intelligible principle "under which President was to act.

That principle was adhered to in "the express limitations that (1) §5(b) of the TWEA shall become operative only in 'time of war' or 'any other period of national emergency declared by the President' (i.e., a congressional requirement that the President, before acting in peacetime, must find and declare the fact that a national emergency exists), and (2) that the power delegated therein shall be applied only to 'property in which any foreign country or a national thereof has any interest." Id., at 580-581.

The uniqueness of each emergency circumstance, the inability to legislate in minute detail in advance with respect to each one, and the need for immediate action to combat it, all conducted to make the delegation in section 5(b) a proper one.

> It cannot be lightly dismissed that the TWEA is operative only during (war or) national emergencies, which inherently preclude prior prescription of specific, detailed guidelines.... Clearly, Congress can be "constitutionally required to appraise beforehand the myriad situations" even less stringently when legislating with respect to the inherently unknown and unknowable problems which may accompany a future national emergency.
>
> The need for prompt action, another essential feature of a national emergency, precludes the otherwise oft-provided requirements for prior hearings, extensive fact finding, Tariff Commission reports to the President, and the like. Emergencies, by definition, require a quick, decisive response. Of the three brances of government, only the Executive has a continuing, spontaneous capacity for mounting such a response. Further, emergencies are expected to be short-lived. Id., at 581-582.

The CCPA concluded its opinion as follows:

> The broad and flexible construction given to §5(b) by the courts which have considered it is consistent with the intent of Congress and with the broad purposes of the Act. As was said by the Supreme Court in discussing the President's power to define "banking institution" under an earlier version of §5(b): "The power in peace and in war must be given generous scope to accomplish its purpose" Propper v. Clark, 337 U.S. 472, 481, 69 S.Ct. 1333, 1339, 93 L.Ed. 1480 (1949). Though such a broad grant may be considered unwise, or even dangerous, should it come into the hand of an unscrupulous, rampant President, willing to declare an emergency when none exists, the wisdom of a congressional delegation is not for us to decide. As was said in Norman v. B. & O. R. Co., 294 U.S. 240, 297, 55 S.Ct. 407, 411, 79 L.Ed. 885 (1935), with respect to "gold clause" measures: "We are not concerned with their wisdom. The question before the Court is one of power, not of policy."
>
> Congress, fully familar with its own use of duties as a means of regulation delegated to the President, in §5(b) of the TWEA, the power to regulate importation during declared national emergencies by means appropriate to the emergency involved. Interpreted as having authorized the President's imposition of the specific surcharge in Proclamation 4074, as a reasonable response to the particular national emergency declared therein, the delegation in §5(b) of the TWEA passes constitutional muster.
>
> Accordingly, the President's action under the review was within the power constitutionally delegated to him, and the judgment of the Customs Court that said action was ultra vires must be reversed. Id., at 583-584.

United States v. Ginsburg, 376 F. Supp. 714 (D.Conn. 1974). In this case, a prosecution for wilful violations of income tax laws, the court upheld the validity of a Treasury Regulation which requires financial

institutions to inform the Federal Reserve Bank of all "transactions involving $10,000 or more of United States currency in any denominations." In describing the regulation, the court said:

> ... [it] was duly issued in 1945 by the Secretary of the Treasury pursuant to the authority granted under Section 5 of the Trading with the Enemy Act, as amended, 50 U.S.C. App. §5(b)(1). While enacted originally in 1917 to track foreign agents and foreign financial manipulations, the Act, as amended in 1941, extended the Secretary's permissible scope of inquiry into certain domestic currency transactions. ...

The court found that the regulation did not require disclosure of privacy protected-type information in violation of the 4th Amendment, nor unreasonably discriminated between classes of depositors or otherwise contravene the due process clause of the 5th Amendment.

Welch v. Shultz, 482 F.2d 780 (D.C. Cir. 1973). This case concerned the validity of the refusal by Office of Foreign Assets Control of a request for a license to send money to a Canadian organization which would use it to purchase supplies for civilian use in North and South Vietnam. The district court awarded summary judgment to the Government and held that the regulation was authorized by the TWEA and that the refusal to grant a license in these circumstances did not violate the Constitution. On appeal, the case was remanded to the district court with directions to examine the matter in light of the agreement by the parties to the conflict to terminate the hostilities in Vietnam.

42 Ops. Atty. Gen. No. 35 (Feb. 3, 1968). The power of the President to regulate foreign investment by persons subject to the jurisdiction of the United States during a period of declared national emergency is supported by section 5(b) of the TWEA, which has been the foundation for a variety of Executive controls of domestic as well as international financial transactions.

The Foreign Direct Investment Program generally restricted transfers of capital to foreign countries by substantial investors in the United States, and required repatriation to this country by such investors of portions of their earnings and short term financial assets. It was administered pursuant to EO 11387 (Jan. 1, 1968) and was based on section 5(b) of the TWEA and President Truman's 1950 Proclamation (No. 2914, 15 F.R. 9092 (1950)) of national emergency.

The opinion finds support for its view in four considerations: (1) the clear language of the statute, (2) the historical precedents of Executive action under section 5(b) over the past 35 years, together with acts of Congress and judicial decisions which have sustained the President's authority under the statute, (3) the continued existence of the national emergency declared by President Truman, and (4) the relation of the precedents under section 5(b) to the present exercise of Executive authority.

" ... language [of section 5(b)] specifically authorizes regulation of capital investment transactions by its references, inter

alia, to the exporting, and importing of gold, currency, or securities, and to transfers of credit or payments through banking institutions. Authority to require repatriation of foreign earnings and short-term financial assets held abroad is established also by the statutory power to 'direct and compel, . . . withdrawal, transportation of, . . . any property in which any foreign country or a national thereof has any interest, by any person, . . . subject to the jurisdiction of the United States . . . ."

The courts have recognized the extensive authority granted to the President by the plain words of the enactment. It is a broad grant of power, particularly with respect to international financial transactions. As will be outlined below, it has in successive enactments been deliberately reaffirmed and broadened by the Congress, in recognition of the need to meet grave emergency conditions with authority ample enough to deal successfully with them.

Since 1941 section 5(b) has conferred authority on the President to define "any or all" of the terms used in the statute itself. It seems evident that Congress intended by such an extra ordinary grant of authority to allow the President great flexibility in using the emergency authority of section 5(b) to deal with the varied and complex financial transactions encompassed by this section. As the Supreme Court stated in construing an earlier version which empowered the President to define only the term "banking institution": "The power in peace and in war must be given generous scope to accomplish its purposes." Propper v. Clark, 337 U.S. 472, 481 (1942).

Section 5(b) has been the statutory foundation for a variety of Executive controls of domestic as well as international financial transactions. This section, first enacted in the Trading with the Enemy Act of 1917, 40 Stat. 415, was originally designed to give the President authority to control commerce with countries with which the U.S. was then at war. Thus, section 5(b) in its original form gave the President power to regulate transactions in foreign exchange, the export or hoarding of gold, and transfers of credit abroad in any form, but the power expressly did not apply to purely domestic transactions.

In the economic crisis which faced President Franklin D. Roosevelt upon taking office in March of 1933, section 5(b) was extended by the President and the Congress into the field of domestic banking transactions. On March 6, 1933, as one of his first acts, President Roosevelt proclaimed a bank holiday under authority of this statute. Proclamation 2039. Congress convened on March 9, and promptly enacted the Emergency Banking Act, 48 Stat. 1, in which it "approved and confirmed" the actions taken by the President pursuant to section 5(b). The Emergency Banking Act also amended section 5(b) to authorize the President to regulate "transfers of credit between or payments by banking institutions as defined by the President," and deleted the exclusion of domestic transaction.

"In the following months, President Roosevelt, under authority of section 5(b), issued a series of Executive orders ... which prohibited transactions in foreign exchange, the removal of gold from the

United States, and which affirmatively required surrender of gold holdings to Federal Reserve Banks. On January 30, 1934, Congress again ratified all actions taken by the President under section 5(b) c.6, 48 Stat. 343, 12 U.S.C. 213.

The courts sustained the validity of the President's acts in this emergency period.

Section 5(b) was also the statutory basis for broad Executive actions to freeze the assets of nationals of enemy or occupied countries during World War II. A series of Executive blocked transactions in foreign exchange, transfers of credit and the export of currency, to the extent such transactions related to property owned by enemy or occupied countries or their nationals. (n. 3. Sec., e.g. EO 08389, Apr. 10, 1940, 5 F.R. 1400; 8405, May 10, 1940, 5 F.R. 1677; 8446, June 17, 1940, 5 F.R. 2279 and 8484, July 15, 1940, 5 F.R. 2585)

The vesting provisions of section 5(b) served as the basis for the series of Executive orders and regulations issued during WWII which effected seizure of enemy assets by the Alien Property Custodian Sec. e.g. Executive Order 9095, Mar. 11, 1942, 7 F.R. 1971; 9747, July 3, 1946, 11 F.R. 7518, and 9788 July 14, 1946, 11 F.R. 11981.

In the domestic aspect, the statute was also the basis for the system of consumer credit controls in force during WWII, part of the postwar period and the Korean War. E.O. 8843, Aug. 9, 1941, 6 F.R. 4035; see also First War Powers Act, Dec. 18, 1941, c. 593, 55 Stat.

838, Joint Resolution of Aug. 8, 1947, c. 517, 61 Stat. 921, Joint Res. of Aug. 16, 1947, c. 517, 61 Stat. 921, Joint Resolution of Aug. 16, 1948, c. 836, 62 Stat. 1291; Defense Production Act, Sept. 8, 1950, c. 932, sec. 601, 64 Stat. 812.

The Exec. authority under section 5(b) has not lapsed with the end of the economic crisis of the 1930's or World War II. Executive Order 6260, Aug. 28, 1933, issued pursuant to section 5(b) by President Roosevelt on Aug. 28, 1933, to prohibit the holding or export of gold, was expressly confirmed and extended by Pres. D.D. Eisenhower in 1960 and 1961, and by Pres. J.F.K. in 1962. Regulations issued by the Secretary of the Treasury, pursuant to a general delegation of Presidential authority under section 5(b) made in 1942, continue this date to serve as the basis for blocking trade and financial transactions with North Korea, Mainland China, Cuba and North Vietnam.

Judicial decisions have sustained these current exercises of authority under section 5(b). In 1965, the United States Court of Appeals for the Ninth Circuit upheld convictions for possession of gold, in violation of E.O. 6260. Pike v. U.S., supra. Exec. authority under section 5(b) was also sustained by the U.S. Court of Appeals for the Second Circuit in a 1966 decision which held valid the prohibition of transfer of property owned by Cuban nationals.

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APPENDIX 6

STATEMENT OF JOHN E. CLUTE, PRESIDENT, SHANGHAI POWER CO., CONCERNING H.R. 1560

This statement is submitted on behalf of Shanghai Power Company, a Delaware corporation which qualifies as a "national of the United States" under Section 502(1)(B) of the International Claims Settlement Act of 1949, as amended (22 U.S.C. §§ 1643–1643k, Supp. II). The Company holds the largest adjudicated claim of a U.S. national against the People's Republic of China under that Act.

Our specific concern with respect to the repeal or modification of Section 5(b) of the Trading with the Enemy Act is the possibility that such an action might delay or even seriously prejudice the settlement of all American claims against China. This could be the result if Section 5(b) were repealed or if it were modified without due regard for the interests of the American claimants.

In a more general sense we believe it is essential that Section 5(b), or its functional equivalent, be preserved so that there will be no doubt that the Executive and Legislative branches share the conviction that our Government must be able in the future to act in the international economic sphere promptly and decisively to protect the interests of the country and of its nationals in those unusual situations that require this type of action.

Shanghai Power Company was probably the largest single industrial enterprise in China in 1950, and it is proud of the contribution that it made to the development of the Chinese economy both before and after World War II.[1] Its claim against the People's Republic of China is based on the seizure of its properties in China by that Government in 1950 without offer or payment of any compensation. The loss suffered by the Company has been certified by the Foreign Claims Settlement Commission of the United States at $53,832,885 plus interest at 6% per annum from December 28, 1950 to the date of settlement.

In addition, a subsidiary of Shanghai Power Company named Western District Power Company of Shanghai Federal Inc., U.S.A. ("Western District Power Company"), a China Trade Act corporation, likewise had its properties seized by the People's Republic of China in December 1950. The Foreign Claims Settlement Commission of the United States has certified the loss of Western District Power Company at $1,758,684 plus interest at the rate of 6% per annum from December 28, 1950 to the date of settlement. Thus, the properties of these two American companies seized by the People's Republic of China had a total value of $55,591,569. Taking into account the fact that this amount is expressed in 1950 dollars, and considering the severe decline in the purchasing power of the dollar, it is evident that this figure does not come close to reflecting the real economic loss suffered by Shanghai Power Company. Even if Shanghai Power Company were paid some $90 million of interest to date in accordance with the decision of the Foreign Claims Settlement Commission (for a total in excess of $145 million), this would not wholly offset the companies' losses.

For many years the hostility between the Governments of the United States and the People's Republic of China precluded any discussions with respect to the settlement of the American claims. In recent years the claims have been recognized as one of the principal items that will require solution before full resumption of normal ties between the two countries can be achieved, including full diplomatic representation and the resumption of trade and commercial relations without the overhanging threat of litigation. There have been reports from time to time that serious discussions of the claims have taken place between representatives of the two nations since 1973.

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[1] See *Encyclopedia Britannica*, Vol. 20, p. 346 (1971 ed.); Zumwalt, *On Watch*, p. 16 (New York Times Book Co., Inc., 1976).

We understand that the key to a possible settlement is the fact that there is in the United States a total of, perhaps, $80 million of Chinese assets that are blocked under the Foreign Assets Control Regulations (31 CFR Part 500) and that the settlement talks contemplate that the People's Republic of China will assign those blocked assets to the United States for application toward the payment of the American claims against the People's Republic of China totaling about $197 million exclusive of interest since 1950. If such a settlement were reached and if no further payment were made by the People's Republic of China on account of the American claims, the American claimants would receive some 40 cents on the dollar of their losses (exclusive of interest and of any adjustment for depreciation of the dollar). Such compensation could hardly be characterized as either prompt or adequate but it would at least be something more than purely nominal.

The blockage of the Chinese assets rests squarely upon the statutory foundation of Section 5(b) of the Trading with the Enemy Act, which has been on the statute books (though modified from time to time) for approximately 60 years. Its precursors date back to an Act of Congress of July 13, 1861, and the 1861 Act itself was grounded upon the common law of both England and the United States.

Section 5(b) is operative during "the time of war or during any other period of national emergency declared by the President . . ." When the National Emergencies Act (Public Law 94–412) was adopted by the Congress in 1976, it was recognized that Section 5(b) of the Trading with the Enemy Act was of a particular importance that required its exemption from those provisions of the National Emergencies Act terminating the powers and authorities possessed by the Executive Branch as a result of a declaration of national emergency. We believe that this was and continues to be a correct perception and that Section 5(b) should remain in effect with only such changes, if any, as are necessary to satisfy the Congress that the Executive will review periodically the advisability of continuing in effect measures founded upon emergency conditions.

In reality there is nothing to take the place of Section 5(b) except for the broad constitutional powers of the President in respect of the foreign relations of the United States. Its invocation by the President has on a number of occasions been supported by the Congress such as its enactment of Titles II and IV of the International Claims Settlement Act of 1949 involving the vesting of the properties of Hungary, Romania, Bulgaria, and Czechoslovakia. These actions served well the interests of this nation, and the measures taken by the Executive and Legislative Branches have consistently been upheld by the Courts against legal challenge.[2]

It is hoped that the Congress will give serious consideration to the possible effects that revisions to Section 5(b) might have upon existing foreign asset controls as well as such controls as may be called for in the future. During the Subcommittee's hearings several authorities have stated that they are uncertain as to whether the United States Government's blockages of foreign assets now in effect (e.g., China, Cuba, Czechoslovakia, and Viet Nam) could, as a legal matter, be maintained in the face of a Congressional declaration that the national emergencies that gave rise to such blockages no longer exist for the purposes of Section 5(b). For example, reference was made to the opinion of Judge Leventhal in *Nielsen* v. *Secretary of the Treasury*, 424 F. 2d 833 (1970), which indicates that the Presidential national emergency proclamation was regarded by the United States Court of Appeals as an important element sustaining the constitutionality of the freezing of assets within the United States belonging to foreign nationals.

Assuming that in the text of any legislation modifying or replacing Section 5(b) and in the legislative history of any such modification Congress would express its clear intent that blocked assets are not to be released by virtue of the modification, the likelihood of such release occurring as an unintentional consequence of the legislation is remote. Even so, there is some danger that in its desire to clear away what some regard as stale national emergencies, the

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[2] For example, in an opinion rejecting an attack upon the blocking of foreign assets pursuant to Section 5(b) Judge Friendly, speaking for a unanimous Court, said:

"The unquestioned right of a state to protect its nationals in their persons and property while in a foreign country, see 1 Oppenheim, International Law, § 319, at 686–87 (8th Ed. Lauterpacht 1955), must permit initial seizure and ultimate expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail."

(*Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 113 (2d CCA 1966)).

Congress could by inadvertence open the door to a legal challenge of the continuance of foreign asset controls. Such a result could occur, for example, if the Congress were to recast the legislation in the form of a nonemergency statute. The consequences would be most unfortunate and would include:

(a) the disruption of claims settlement negotiations between the United States Government and governments that have confiscated American poverty;

(b) the prolongation of American claims as a barrier to normal commercial relations between the United States and the countries concerned;

(c) litigation that, to the detriment of the American claimants and the U.S. taxpayer, could clog the dockets of trial and appellate courts in the United States for years to come;

(d) frustration of the legitimate expectation of American nationals that the United States Government, including the Congress, will act in such a manner as to protect American interests to the fullest extent possible; and

(e) weakening of the position of the U.S. Government that governments have an international obligation to pay prompt, adequate, and effective compensation for the taking of foreign owned property.

If, as we believe, the legal and political arguments are compelling in favor of preserving the authority found in Section 5(b) as to the blocking of foreign assets, the practical arguments are overwhelming. The likelihood of a settlement of the claims of United States nationals against the People's Republic of China with the consequent removal of a serious impediment to normal relations between the two countries is greatly enhanced by the retention of the blocked Chinese assets. This is not simply a question of leverage; it is a matter of carrying to its logical conclusion the action taken by the United States Government in 1950 with precisely this possibility in mind. If, on the other hand, the blocked assets were to be released, the result could be a greatly reduced desire on the part of the People's Republic of China to settle the claims, protracted litigation, and the perpetuation of an international irritant in a most exacerbated form.

Shanghai Power Company and Western District Power Company oppose the repeal or emascu'ation of Section 5(b) of the Trading with the Enemy Act. If amendments to Section 5(b) are proposed, they should state clearly that the existing foreign asset controls are to continue on the basis of the President's national emergency declarations. They should also confirm the authority of the President to place such emergency controls in effect in the future and to maintain them as long as the national interest may require.

JOHN E. CLUTE.

APPENDIX 7

AMERICAN EXPRESS CO. MEMORANDUM ON THE TRADING WITH THE ENEMY ACT

AMERICAN EXPRESS CO.,
Washington, D.C., March 9, 1977.

MEMORANDUM

Re: Trading With The Enemy Act—Experience of American Express Company

(1) American Express Company is a diversified financial services company operating in about 150 countries. Its policies and products are such that it prefers the minimum of trade restrictions and trade barriers of all types. It also realizes that some restrictions and trade barriers do exist.

(2) Its principal businesses outside the United States include the following: casualty and property liability insurance, travelers cheques, credit card, wholesale travel, retail travel, and commercial and merchant banking.

(3) Many trade barriers exist to these businesses which are in the "service sector" category. A recent Department of Commerce survey indicated that, among the international service sector, perhaps the business most severely affected by trade barriers was the international casualty and property liability insurance business.

(4) In the area of "trading with the enemy", the most current and exemplary problem of American Express lies in the 1975 "liberalization" of trade with Cuba. In 1975, the Administration purportedly liberalized trade with Cuba by allowing offshore subsidiaries of American companies to sell and ship goods of non-U.S. origin to Cuba. Unfortunately, and without intention, the regulations covered only "goods" and not "services". Within a few days when this was brought to the attention of the State, Treasury and Commerce Departments, Cubans troops were discovered in Angola and it became politically inconvenient to amend the regulation to allow "services" into Cuba from offshore subsidiaries of American companies. This has been at substantial cost to American Express' business, and other companies similarly situated.

A case in point would be the case of marine cargo insurance—a large portion of the international insurance industry in the U.S. Because of Cuba restrictions, a "Cuba clause" has been inserted making U.S. issued insurance inoperable in Cuba and difficult to market. Offshore subsidiaries should be able to offer such insurance, comparable to offshore subsidiaries selling goods to Cuba.

(5) Hence, the point is that when trade restrictions are imposed, the freezing of service transactions, particularly financial transactions, seems to be the first frozen; when thawed, the broad range of service industries seems to be left out by inadvertence.

HARRY L. FREEMAN.

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